Supreme Court, U.S.
FILED
JAN 12 2002
OFFICE OF THE CLERK

No.

In The
Supreme Court of the United States

MICHAEL E. TINDALL
Plaintiff-Petitioner
v.
WAYNE COUNTY FRIEND OF THE COURT, By JOSEPH A. SCHEWE, Director of Legal Services; ALAN E. SKROK, Staff Attorney, Assistant Friend Of Court; WAYNE COUNTY SHERIFF'S DEPARTMENT, By: ROBERT FICANO, Sheriff; WAYNE COUNTY CIRCUIT COURT, FAMILY DIVISION, By: KIRSTEN FRANK KELLY, Presiding Judge; MICHAEL F.SAPALA, Chief Judge
Defendants-Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Michael E. Tindall
Counsel of Record
TINDALL & CO. P.C.
49 Macomb Pl., Ste 29
Mt. Clemens MI
48043 (313) 640-4450

QUESTION PRESENTED

The Court in *Tindall v. Wayne County Friend of Court, et al,* 269 F.3d 533 (6th Cir. 2001) held allegations of "bad faith prosecution" should be raised and decided in state court, rather than as an exception to *Younger* abstention in federal court, as this Court has never authorized intervention on bad faith grounds. The appellate court further found it "error" to grant summary judgment against a nonmovant that refuses to rebut a properly supported motion for summary judgment under Fed. R. Civ. P. 56(e). The questions presented are:

1. Whether "bad faith prosecution" must be raised and decided in state court, rather than asserted in federal court, as an exception to *Younger* abstention.

2. Whether summary judgment is properly entered against a non-moving party who does not rebut a properly supported summary judgment motion under Fed. R. Civ. P 56(e).

3. Whether a state court defendant can nullify a judgment against it, and, moot a pending appeal, by intentional post judgment action that expressly continues the collateral consequences caused by its own illegal conduct.

RULE 14.1(b) AND 29.6 STATEMENT

The parties in the court of appeals were Petitioner Michael E. Tindall, and Respondent representatives of the Wayne County Friend of Court and Wayne County Circuit Court, Family Division, in their respective official capacities. Defendant-Appellee Wayne County Sheriff, representative of the Wayne County Sheriff's Department, neither entered an appearance nor filed briefs in the court of appeals. None of the parties are corporate entities.

TABLE OF CONTENTS

QUESTION PRESENTED 2

RULE 14.1(b) AND 29.6 STATEMENT 3

TABLE OF AUTHORITIES 6

OPINIONS BELOW 8

JURISDICTION 8

STATUTES INVOLVED 9

STATEMENT OF THE CASE 10

REASONS FOR GRANTING THE PETITION 13

I. The Sixth Circuit's decision in *Tindall* destroys this Court's long established and scrupulously maintained delicate balance between *Younger* abstention doctrine's deference to state sovereignty; and, *Young* doctrine's preservation of the continuing viability of the Supremacy Clause under Article VI of the Constitution 13

II. The Sixth Circuit's decision in *Tindall* so far departs from this Court's established course of summary disposition practice as to call for the exercise of this Court's power of supervision 17

III. Allowing a state court defendant to moot a pending appeal and vacate an adverse judgment by

illegal, post judgment conduct, that expressly preserves the collateral consequences it illegally created, eviscerates the Supremacy Clause of Article VI of the Constitution 19

CONCLUSION 21

APPENDIX VOL. I:

A. Order of Dismissal, E.D. MI 10/23/01.....3
B. Sixth Circuit Court of Appeals, 10/15/01.... 5
C. Opinion and Order, E.D. MI, 10/30/99 22
D. Opinion and Order, E.D. MI, 9/28/01 54
E. WCCC Transfer Order, 1/14/00 78
F. WCCC Transfer Order, 3/28/00 83

APPENDIX VOL. 2:

G. Michigan Class Action Complaint, 1/00....3

APPENDIX VOL. III:

H. Class Action Opinion/Sanctions ...5/30/00.3

TABLE OF AUTHORITIES

Page(s)

CASES

Federal

Alden et al v. Maine., 527 US 706 (1999) 17

Boddie v. Conn., 401 US 371 (1971) 14

Cameron v. Johnson, 390 US 611 (1965)..14,16, 19

Celotex Corp v. Cotrett, 477 US 317 (1986) ...17,19

County of Los Angeles et al v. Davis, et al,
440 US 625..... 21

Dombrowski v. Pfitser, 380 US 479 (1965).....14

Ex parte Young,
209 US 123(1908).....4,10,11,16,17,18,19,21

Girstein v. Pugh, 420 US 103 (1975) 14

Hoffman v. Pursue, 420 US 592 (1975) 14

Idaho v. Coer'd Aleno Tribe of Idaho,
521 US 261 (1997)..... 16

Johnson v. Mississippi,
403 US 212 (1971) 11,14,15,20

Matsushita Elec. Ind. Co. v. Zenith Rad. Corp.,

475 US 574 (1986) 18

Middlesex County Ethics Comm. V. Garden State Bar Assn. Et al, 457 US 423 (1982) 13

Oshea v. Littleton, 414 US 488 (1974) 21

Perez v. Ladesma, 401 US 82 (1971) 14

Powell v. McCormick, 395 US 486 (1969) 21

Reich v. Collins, 513 US 106 (1994) 17

Spencer v. Kemna, 521 US 1 (1998).....21

Tindall v. Wayne County Friend of Court et al, 269 F.3d 533 (6th Cir 2001) 2,4,12,13,19

Younger v Harris, 401 US 37 (1971)...4,10,11,12,13,14,17,18,19,21

STATUTES AND RULES

Fed. R. Civ. P. 56(c) 1,19

Fed. R. Civ. P. 56(e) 1,18

PETITION FOR A WRIT OF CERTIORARI

Michael E. Tindall ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Order of the District Court dated October 23, 2001 dismissing this action is unreported. (App. A,Vol I, P3.). The underlying decision of the Court of Appeals for the Sixth Circuit, dated October 15, 2001, reversing the District Court is reported at 269 F.3d 533 (6th Cir. 2001)(App.B, Vol. I, P.5). The original decision by the District Court for the Eastern District of Michigan, dated September 30, 1999, is reported at 1999 U.S. Dist. Lexis 15928 (E.D. MI 1999)(App.C, Vol I, P22.). The intervening Memorandum and Order of the District Court, dated September 28, 2001, is unreported. (App.D,Vol I, P 54). The intervening Orders entered by Respondent state court, dated January 14, 2000 (App. E, Vol I, P.78), and, March 28, 2000 (App. F, Vol. I, P 83), are unreported.

JURISDICTION

The decision of the court of appeals was entered on October 15, 2001. (App.B, Vol. I, P.5). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Although the District Court on the merits meticulously analyzed applicable Michigan statutes and court rules, (App. C, Vol. I, P.22) the decision of the Sixth Circuit Court of Appeals considered none of these.

Fed. R. Civ. P. 56(c) provides, in relevant part:

"(c) ...The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law..."

Fed. R. Civ. P. 56(e) provides in relevant part:

"(e) ...When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."

STATEMENT OF THE CASE

A. Factual Background:

Petitioner, an attorney and non custodial parent divorced in Wayne County, brought an *Ex parte Young* [209 US 123(1908)] action pursuant to 28 USC 1983 challenging the delegation of judicial power and judicial decision making authority by Respondent Wayne County Circuit Court, Family Division ("WCCC") to non judicial, prosecutorial personnel of Respondent Wayne County Friend of the Court ("FOC"). Petitioner challenged this delegation of judicial power to prosecutorial persons to: issue show cause orders ("SCOs"), issue bench warrants ("BWs"), and, to suspend professional licenses, as a violation of the Fourth Amendment guarantee of due process of law, and, to a fair and impartial tribunal. Petitioner further alleged FOC violated the Fourth Amendment guarantee of due process of law by failing to comply with Michigan statutes and court rules governing the conduct of FOC hearings; and, that WCCC denied due process by customarily refusing to conduct mandatory de novo judicial hearings from FOC decisions, required under Michigan law.

B. The District Court:

Respondents moved to dismiss the Complaint, citing *Younger* abstention doctrine, among other grounds. Petitioner moved for summary judgment

based on the Verified Complaint, attached exhibits, and, supplemental affidavits and exhibits filed with the motion. Petitioner alternatively sought to consolidate trial on the merits with the preliminary injunction hearing, under Fed. R. Civ. P. 65(a)(2), to resolve any issues of fact the district court found remaining under Fed. R. Civ. P. 56(d).

At the preliminary injunction hearing, the district court heard argument on all motions. Respondent submitted no evidence, counter affidavits or exhibits in support of their response to the summary judgment motion. Despite repeated invitations from the district court to do so, Respondents refused to supplement or otherwise support their response. On September 30, 1999, the district court issued its decision granting Petitioner summary judgment as to Counts IV and V of the Complaint, and, abstaining under *Younger* from consideration of Counts III and VI.

C. Post Judgment Proceedings:

Respondents moved for Relief from Judgment under FRCP 60(b). Petitioner moved, in Respondent state court, to disqualify WCCC from conducting further proceedings in the state divorce case under *Johnson v. Mississippi, 403 US 212 (1971).* The motion to disqualify was "**granted**" on December 10, 1999. Thereafter, however, WCCC entered a secret order, without notice to either state court party, or, hearing of any kind, "**denying**" the previously granted motion and "transferring" the case to an

adjacent county chosen by WCCC. Respondent then moved, on February 1, 2000, to vacate the Judgment against it and dismiss the Complaint, with prejudice, citing post judgment mootness resulting manufactured by the secret order it entered. The district court issued its Memorandum Opinion and Order granting Respondents' motion, pending remand, on September 28, 2001.

D. The Court of Appeals Decision:

The Court of Appeals for the Sixth Circuit reversed the district court's decision of September 30, 1999, on the merits, vacated the Judgment, and, remanded with direction to dismiss Petitioner's Complaint in its entirety. The court declined to reach any of the issues presented, except *Younger* abstention, *Tindall, at 536,* ruling that while bad faith prosecution may serve as a proper exception to *Younger* abstention doctrine, this Court has never authorized federal intervention on bad faith grounds. *Id at 539.* The court held that claims of bad faith prosecution, commonly asserted as an exception to *Younger* abstention in a federal court proceeding, should, instead, be raised in state court by motion or appeal. *Id at 539-540.*

The court further ruled the district court erred in treating Respondent's failure and refusal to rebut Petitioner's properly supported motion for summary judgment as an "admission"; *Id at 539,* and, treating Respondent's "admission" as "evidence of bad faith". *Id.*

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit's decision in *Tindall* destroys this Court's long established and scrupulously maintained delicate balance between Younger abstention doctrine's deference to state sovereignty; and, *Young* doctrine's preservation of the continuing viability of the Supremacy Clause under Article VI of the Constitution.

A. Younger Abstention Doctrine:

Younger v. Harris, 401 US 37 (1971) and its progeny establish the well-known and commonly accepted federal policy against federal intervention in pending state court proceedings, absent extraordinary circumstances. *Middlesex County Ethics Comm. v. Garden State Bar Ass. et al, 457 US 423 (1982).* *Younger* doctrine rests on comity and the proper respect for state functions. It rejects any presumption that state courts will not safeguard constitutional rights, and, expressly presumes that state courts are competent to interpret, recognize and enforce federal rights. Indeed, Article VI of the U.S. Constitution clearly and unambiguously declares the Constitution to be the supreme law of the land and expressly commands state court judges to enforce it, contrary provisions of state law notwithstanding.

For as long as this Court has maintained this policy of deference to paramount state interests, it

has also recognized that the essential predicate to *Younger* abstention in favor of state courts is that the state court must be a "fair and impartial" tribunal. *Hoffman v. Pursue, 420 US 592 (1975) at 594.* A state court that does not provide a meaningful opportunity to be heard is not a "fair and impartial" tribunal. *Boddie v. Conn., 401 US 371 (1971).* Even the mere appearance of the possibility that a state court may not be fair and impartial is sufficient to require remedial action to avoid the mere appearance of impropriety. *Johnson v. Mississippi, 403 US 212 (1971).* *Younger* abstention doctrine and its deference [presumption] to and in favor of state courts does not apply where the state court delegates its judicial power and decision making to non judicial, prosecutorial persons. *Girstein v. Pugh, 420 US 103 (1975) at 108, n9.*

Equally well established is the well known "bad faith prosecution" exception to *Younger* abstention. Contrary to the Sixth Circuit's holding below, this Court has, indeed, authorized intervention on grounds of bad faith prosecution. *Dombrowski v. Pfitser, 380 US 479 (1965).* This Court has defined bad faith prosecution to include exactly the pattern of discriminatory enforcement, designed to inhibit the exercise of federal rights, that Petitioner has challenged in this case. *Perez v. Ledesma, 401 US 82 (1971) at P119, n11 (Brennan J. concurring). See, also, Cameron v. Johnson, 390 US 611 (1965).* As Justice Brennan stated in *Perez,*

supra at 120:

> **"Where the ground is bad-faith harassment, intervention is justified whether or not a state prosecution is pending. Intervention in such cases does not interfere with the normal good-faith enforcement of state criminal law by constitutional means ...It simply prevents the unconstitutional use of the state's criminal law in bad faith against the federal plaintiff."**

The Sixth Circuit's ruling that allegations of bad faith prosecution should be raised and decided in state court, rather than as grounds for exception to *Younger* abstention in federal court, literally eliminates the bad faith exception to *Younger* abstention entirely. *Younger* abstention is a federal doctrine, by which a federal court stays its own hand, and, defers to a state court's pending proceeding precisely because the federal court is satisfied that the state court proceeding will provide a fair and impartial tribunal to adjudicate federal rights. Bad faith is an issue for determination by a federal court, not the state court. *Cameron v. Johnson, 390 US 611 (1968).* Allowing a state court to decide, for itself, the question of whether its own proceedings are brought in bad faith makes the state court the final arbiter of its own conduct and destroys any prospect of relief to end an ongoing violation of federal law by state court actors. Such a determination clearly rests with the federal court,

not the state court. *Idaho v. Coer'd Alene Tribe of Idaho, 521 US 261 (1997) at 287.*

B.Young Doctrine and the Supremacy Clause:

Ex parte Young doctrine balances *Younger* abstention to preserve the continuing viability of the Supremacy Clause and its command that state court judges respect and enforce federal constitutional guarantees, notwithstanding any contrary provisions of state law. The importance of having federal courts open to enforce and interpret federal rights supersedes even paramount state interests. *Idaho, supra at 293-294.* The propensity of states to erect obstacles to deter the enforcement of federal constitutional rights has been clearly recognized by this Court. *Idaho, supra, at 273-274. 1*

---

1. Precisely such obstacles have been consistently applied by Michigan Courts to penalize and discourage the enforcement of federal rights and to continue the illegal procedures complained of in this case, including: (1) the appointment of a state court receiver to dismiss the federal case before it could be decided; (2) the post judgment entry of secret orders transferring the state case to moot the appeal and vacate the adverse judgment(App.E,F Vol I, PP78, 83); (3) the dismissal of a subsequent state class action raising the very same claims that the district court abstained from considering here (App.G,Vol.II,P3); and,(4) the precipitous use of state

Young doctrine and *Younger* abstention doctrine form a delicate balance between deference to state sovereignty and the enforcement of clearly predominant federal constitutional rights. *Perez, supra, at 120.* That balance is clearly dependent on a correct *federal* evaluation of allegations of bad faith prosecution, *Id.*, with the enforcement of individual constitutional guarantees grounded in due process taking priority over any alleged paramount state interests. *Alden et al v. Maine, 527 US 706 (1999) at 733 and 740 (citing Reich v. Collins, 513 US 106 (1994).*

II. The Sixth Circuit's decision in *Tindall* so far departs from this Court's established course of summary disposition practice as to call for the exercise of this Court's power of supervision.

By federal court rule and the decisions of this Court, a clear and unambiguous uniform standard for summary disposition practice in federal courts has been established. A party moving for summary judgment bears the burden of informing the court of the basis for the motion and demonstrating: (1) the absence of any genuine issue of material fact; or, (2) the absence of evidence supporting the non moving party's position. *Celotex Corp. v. Cotrett, 477 US 317 (1986) at 323 and 325; Fed. R. Civ. P. 56(c).* The burden then shifts to the non-moving party to go

---

pleading sanctions to penalize and discourage further challenges to the unconstitutional conduct of Michigan courts. (App.H, Vol. III, P3.)

beyond the pleadings and present affirmative evidence, exhibits, or affidavits designating specific facts showing a genuine issue of material fact for trial. *Id at 324; Matsushita Elec. Ind. Co. v. Zenith Rad. Corp., 475 US 574 (1986) at 586.* The non-moving party must rebut the moving party's contention of an absence of evidence supporting the non-moving party's position. Summary judgment is appropriate against a non-moving party that fails to rebut the moving party's position. *Fed. R. Civ. P. 56(e); Celotex, supra, at 322; Matsushita at 586.*

The Sixth Circuit's misapplication of this clearly established standard on the crucial federal issue of bad faith prosecution for purposes of *Younger* abstention clearly calls for the exercise of this Court's supervisory power over subordinate federal courts. By altering the well-established summary judgment practice on this bad faith issue, the court of appeals tipped the delicate balance between *Young* and *Younger* doctrines in a way that completely negates the VI Amendment mandate of the Supremacy clause.

The district court did exactly what *Younger* doctrine required it to do; make a *federal* determination as to bad faith to determine the existence of an exception to *Younger* abstention. As the district court repeatedly stated in both its original and its subsequent intervening opinions, Petitioner supplemented its Verified Complaint and motion with extensive exhibits and affidavits. App.C,

D, Vol I, PP 22 and 54. Respondents, despite numerous opportunities and invitations from the district court to do so, failed to rebut any of the evidence Petitioner submitted. Indeed, in its intervening opinion, the district court expressly found that even Respondent's belatedly submitted affidavit *supported* Petitioner's claims that no circuit judge independently reviews SCOs and BWs prior to issuance by FOC prosecutorial personnel.

The district court did not, as the court of appeals opinion postured, take Respondents' failure to rebut as an "admission"; and, it did not use or rely on that "admission" as evidence of bad faith. *Tindall at 539.* The district court addressed the only evidence before it, Petitioner's evidence, and made the required *federal* determination that bad faith had been shown. *Cameron v. Johnson, 390 US 611 (1965).* Later, the district court confirmed that even Respondents' proffered post judgment evidence supported this conclusion. The Sixth Circuit's, misapplication of established summary judgment standards of practice directly compromises the delicate balance between *Young* and *Younger* doctrines, and, completely guts the bad faith exception to *Younger* established and consistently maintained by this Court.

III. Allowing a state court defendant to moot a pending appeal and vacate an adverse judgment by illegal, post judgment conduct, that expressly preserves the collateral consequences it illegally created, eviscerates the Supremacy Clause of

Article VI of the Constitution.

One need only view the post judgment conduct of Respondent WCCC to conclude that the *Younger* predicate of a "fair and impartial" state tribunal did not exist. Following the entry of an adverse judgment, WCCC "**granted**" Petitioner's state court motion to disqualify itself under *Johnson v. Mississippi, supra.* WCCC then refused to enter an order confirming its own ruling. Instead, it entered a secret order, without notice to either state court party and without hearing, "**denying**" the motion it had previously "**granted**", and, administratively transferring the state case to an adjoining county of its own choosing. 2 WCCC did not give notice to the state court parties of the modification or entry of this order, and, did not serve a copy of it on either state court party. Rather, it used the secret order as the basis for its Motion to Vacate the adverse judgment on grounds of post judgment mootness.

The secret order entered by WCCC to transfer the state case expressly preserved, by its terms, the collateral consequences of receivership, sanctions, and, illegal account adjustments flowing directly

---

2. *Michigan administrative rules of procedure require the State Court Administrator's Office ("SCAO") to select the new county of transfer, and, expressly forbid any contact between the transferor judge and the new judge or county, or, even the suggestion of a transferee county by the transferor judge.*

from Respondent's unconstitutional conduct. App.E, Vol I, PP 78-82. While these collateral consequences remain outstanding, the case and its appeal cannot become moot. *Powell v. McCormis, 395 US 486 (1969) at 499-500; Oshea v. Littleton, 414 US 488 (1974).*

This Court has recognized the propensity of state government defendants to act to moot the issues of a case to avoid appellate review of their own illegal conduct. *County of Los Angeles et al v. Davis et al, 440 US 625 (1979).* Those issues cannot be mooted until all collateral effects of the illegal conduct have been completely and irrevocable eradicated. *Id at 631.* The burden of demonstrating this complete and irrevocable eradication fell squarely on Respondents. *Spencer v. Kemna, 523 US 1 (1998).*

By its own secretly entered order, WCCC preserved the collateral consequences of its own illegal actions. The effort to moot the issues of this case, post judgment, failed.

Conclusion:

The Sixth Circuit Court of Appeals in this case has turned both *Younger* abstention and *Ex parte Young* doctrine on their literal ear. By consigning to the state court the issue of bad faith prosecution, the Sixth Circuit has effectively eliminated the bad faith exception to *Younger* abstention; and, deprived individual litigants of any

effective means to challenge the unconstitutional conduct of state court actors, or, enforce their due process guarantee of a fair and impartial state tribunal so carefully preserved by *Young* and its progeny. This Court should, therefore, grant this petition to restore the delicate balance it has so carefully created and maintained.

Respectfully submitted,

Michael E. Tindall
TINDALL & CO. P.C.
49 Macomb PL., Ste 29
Mt. Clemens, MI 48043
(313) 640-4450
Counsel of Record

Dated: January 14, 2002

Supreme Court, U.S.
FILED
(2)
011168 JAN 12 2002
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

MICHAEL E. TINDALL
Plaintiff-Petitioner
v.

WAYNE COUNTY FRIEND OF THE COURT, BY JOSEPH A. SCHEWE, Director of Legal Services; ALAN E. SKROK, Staff Attorney, Assistant Friend Of Court;WAYNE COUNTY SHERIFF'S DEPARTMENT, By: ROBERT FICANO, Sheriff; WAYNE COUNTY CIRCUIT COURT, FAMILY DIVISION, By: KIRSTEN FRANK KELLY, Presiding Judge; MICHAEL F.SAPALA, Chief Judge
Defendants-Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

APPENDIX I TO PETITION FOR A WRIT OF CERTIORARI

Michael E. Tindall
TINDALL & CO. P.C.
49 Macomb PL
Suite 29
Mt. Clemens MI 48043
(313) 640-4450

Counsel for the Petitioner

85 PP

Appendix A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHLGAN
SOUTHERN DIVISION

MICHAEL E. TINDALL.

Plaintiff.

Case No. 98-C V-73896-DT

V.

HONORABLE DENISE PAGE HOOD

WAYNE COUNTY FRIEND OF COURT, by: JOSEPH A. SCHEWE. DIRECTOR OF LEGAL SERVICES, and ALAN E. SKROK, STAFF ATTORNEY and ASSISTANT FRIEND OF COURT; WAYNE *COUNTY* SHERIFF'S DEPARTMENT, by: ROBERT FICANO. SHERIFF~ WAYNE CO~JNTY CIRCUIT COURT. FAMILY DIVISION, by: KIRSTEN FRANK KELLY, PRESIDING JUDGE, MICHAEL F. SAPALA, CHIEF JUDGE,

Defendants.

ORDER DISMISSING COMPLAINT

Pursuant to the Remand and Judgment entered by the United States Court of Appeals for the Sixth Circuit tiled October 15, 2001,

IT IS ORDERED that the Complaint is DISMISSED in its entirety.

"S/_____
DENISE PAGE HOOD
UNITED STATES DISTRICT JUDGE

DATED: OCTOBER 23, 2001

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MICHAEL E. TINDALL, Plaintiff-Appellant,

v.

WAYNE COUNTY FRIEND OF THE COURT, by: JOSEPH A. SCHEWE, Director of Legal Services; ALAN E. SKROK, Staff Attorney; ASSISTANT FRIEND OF COURT; WAYNE COUNTY SHERIFF'S DEPARTMENT, by: ROBERT FICANO, Sheriff; WAYNE COUNTY CIRCUIT COURT, FAMILY DIVISION, by: KIRSTEN FRANK KELLY, Presiding Judge; MICHAEL F. SAPALA, Chief Judge, Defendants-Appellees.

MICHAEL E. TINDALL, Plaintiff-Appellant/Cross-Appellee,

v.

WAYNE COUNTY FRIEND OF THE COURT, by: JOSEPH A. SCHEWE, Director of Legal Services; WAYNE COUNTY SHERIFF'S DEPARTMENT, by:

ROBERT FICANO, Sheriff; ALAN E. SKROK, Staff Attorney; ASSISTANT FRIEND OF COURT, Defendants, WAYNE COUNTY CIRCUIT COURT, FAMILY DIVISION, by: Kirsten Frank Kelly, Presiding Judge; Michael F. Sapala, Chief Judge, Defendants-Appellees/Cross-Appellants.

MICHAEL E. TINDALL, Plaintiff-Appellant/Cross-Appellee,

v.

WAYNE COUNTY FRIEND OF THE COURT, by: Joseph A. Schewe, Director of Legal Services; Alan E. Skrok, Staff Attorney, Defendants-Appellees/Cross-Appellants, Wayne County Sheriff's Dep't, et al.,

Nos. 99-2208/99-2312/99-2319

June 13, 2001, Argued

October 15, 2001, Decided

October 15, 2001, Filed

PRIOR HISTORY:

Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 98-73896. Denise Page Hood, District Judge.

Tindall v. Wayne County Friend of Court, 1999 U.S. Dist. LEXIS 15928 (E.D. Mich. 1999)

DISPOSITION:
VACATED judgment of district court and REMANDED with instructions to dismiss complaint.

COUNSEL:
ARGUED: Michael E. Tindall, TROMBLY TINDALL, Port Huron, Michigan, for Plaintiff.

Margery Moselle Mann, WAYNE COUNTY FRIEND OF THE COURT, LITIGATION SECTION, Detroit, Michigan, Joseph C. Marshall, III, DICKINSON, WRIGHT, MOON, VAN DUSEN & FREEMAN, Detroit, Michigan, for Defendants.

ON BRIEF: Michael E. Tindall, TROMBLY TINDALL, Port Huron, Michigan, for Plaintiff.

Margery Moselle Mann, Janet E. LeAnnais, WAYNE COUNTY FRIEND OF THE COURT, LITIGATION SECTION, Detroit, Michigan, Joseph C. Marshall, III, Kathleen A. Lang, Ann J. Foeller, DICKINSON, WRIGHT, MOON, VAN DUSEN & FREEMAN, Detroit, Michigan, for Defendants.

JUDGES:
Before: RYAN and COLE, Circuit Judges; MARBLEY, District Judge. *

* The Honorable Algenon L. Marbley, United States District Judge for the Southern District of Ohio, sitting by designation.

OPINIONBY:
R. GUY COLE, JR.

OPINION:

R. GUY COLE, JR., Circuit Judge. Attorney and divorce Michael E. Tindall is a noncustodial parent who has continually and inexplicably failed to comply with court orders requiring him to make support payments for his minor children. He has been the subject of at least eight enforcement proceedings to collect delinquent support payments, instituted under Michigan's Friend of Court Act, Mich. Comp. Laws Ann. § 552.501 et seq., and its Support and Visitation Enforcement Act, Mich. Comp. Laws Ann. § 552.601. Dissatisfied with the manner in which those proceedings were conducted, Tindall filed the instant action raising various federal claims. Named in Tindall's lawsuit are Defendants-Appellees the Wayne County Friend of the Court ("FOC"); the Wayne County Circuit Court, Family Division ("WCCC"); the Wayne County Sheriff's Department ("Sheriff's Department"); and individual defendants Joseph A. Schewe, Director of

FOC Legal Services; Alan E. Skrok, FOC Staff Attorney; Robert Ficano, Sheriff, Wayne County Sheriff's Department; Kirsten Frank Kelly, Presiding Judge, WCCC; and Michael F. Sapala, Chief Judge, WCCC [all collectively referred to herein as "Defendants"].

Tindall appeals from the district court's grant in part of the motions to dismiss of Defendants-Appellees, specifically challenging the district court's application of the Younger v. Harris abstention doctrine to Counts III and VI of his complaint in refusing to determine the constitutionality of Mich. Comp. Laws Ann. § 552.628 ("License Act"), which provides for the suspension of the occupational or driver's license of a delinquent child-support payer; and whether the FOC's failure to follow established policies for conducting referee and judicial hearings violated his right to due process. Tindall also assigns error to the district court's denial of his request for injunctive relief under the Federal Courts Improvement Act of 1996, as to Counts IV and V of his complaint; and to the district court's alleged misapplication of the Fed. R. Civ. P. 12(b)(6) standard in evaluating his claims.

Cross-Appellants the FOC and the WCCC raise challenges of the district court's grant in part of Tindall's motion for summary judgment and assert that: (1) the district court violated the Eleventh Amendment when it exercised subject-matter jurisdiction over Tindall's claims; (2) the post-complaint transfer of Tindall's divorce action to

Macomb County Circuit Court rendered moot his claims, thus requiring us to vacate the district court's judgment in this case; (3) the district court erroneously concluded that Tindall had standing to assert the claims raised in his complaint; (4) the district court improperly refused to abstain from ruling on all of Tindall's claims; (5) the district court erred by permitting Tindall to proceed under the Declaratory Judgment Act; and (6) the district court, in granting Tindall's summary judgment motion, erroneously concluded that Defendants' procedures for issuing show cause orders and bench warrants were unconstitutional. n1

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - -

n1 Defendant-Appellee Sheriff's Department has neither entered an appearance in this matter nor filed briefs for purposes of this appeal. Thus, we will assume that it has impliedly adopted the arguments raised by its co-appellees, the WCCC and the FOC.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - -

This case presents a host of legal questions for our consideration. Because, however, we conclude that the district court properly should have abstained from reaching any of Tindall's claims, we decline to reach any issue except that pertaining to abstention. We therefore VACATE the order of the district court and REMAND this case with instructions to dismiss Tindall's complaint.

I. BACKGROUND

In December 1991, a divorce judgment issued in the Wayne County Circuit Court ending the marriage of Michael and Grace Tindall, pursuant to which, Tindall was ordered to make support payments for his two minor children. He repeatedly failed to make the required payments. Between October 1993 and April 1997, no fewer than five show cause orders issued ordering Tindall to answer for his failure to pay court-ordered child support. When Tindall failed to appear at these hearings, bench warrants issued immediately thereafter. Tindall alleges that the WCCC and the FOC violated their established procedures by pre-signing these show cause orders and bench warrants and by allowing them to be issued by nonjudicial officers.

A WCCC representative issued another show cause order on April 25, 1997, ordering Tindall to appear at a hearing to answer for his failure to comply with the court's previous child support order, which had resulted in the August 21, 1996, issuance of a bench warrant. Tindall failed to appear at this hearing and instead sent his attorney to inform the court that he had never received notice of the hearing and that he had not been made aware that a bench warrant for his arrest had issued until the morning of the hearing. FOC attorney Shelly Payne disputes this point. When further confusion developed at the hearing concerning who had authorized the issuance of the

August 21, 1996, warrant and where that warrant was currently located, Payne drew up a new warrant, signed by Judge Giovan, requiring Tindall again to show cause why he should not be held in contempt. n2

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - -

n2 At the hearing, Payne admitted that she had authorized the warrant, which Tindall points to as evidence that the FOC and its employees disregarded established procedures for issuing bench warrants. See Mich. Court Rules [hereinafter M.C.R.] 3.208(B) (noting that while a friend of court may petition for a show cause order, only a court may issue a bench warrant); see also Mich. Comp. Laws Ann. § 552.631 (same).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - -

In response to the May 14, 1997, warrant, Tindall filed a Complaint for Superintending Control in the Michigan Court of Appeals, accompanied by an "Emergency Ex Parte Motion for Superintending Control and to Stay Enforcement of a Void Bench Warrant," in which Tindall objected to the procedures that had been employed during the pendency of his divorce action. n3 Specifically, he challenged the manner in which show cause orders had been issued and how show cause hearings had been conducted and questioned the propriety of Judge Giovan's and Payne's continued participation in his divorce action. The Michigan Court of Appeals

issued a summary order denying Tindall's Complaint for Superintending Control on May 22, 1997. Tindall filed a Complaint for Superintending Control in the Michigan Supreme Court on May 27, 1997, lodging the same grievances raised in the previous complaint filed in the Court of Appeals. In a June 5, 1997, order, the Michigan Supreme Court declined review of Tindall's petition on June 5, 1997.

Tindall v. Wayne Circuit Judge, 454 Mich. 921, 564 N.W.2d 50, 1997 Mich. LEXIS 1285 (1997)

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - -

n3 Under Michigan law, superintending control orders are used to determine "if the inferior tribunal, upon the record made, had jurisdiction, whether or not it exceeded that jurisdiction and proceeded according to law." People v. Burton, 429 Mich. 133, 413 N.W.2d 413, 416 (Mich. 1987). Superintending control is an extraordinary power that may be exercised when a petitioner demonstrates both the respondent's failure to perform a clear legal duty and the absence of an adequate legal remedy. See In re Recorder's Court Bar Ass'n v. Wayne Circuit Court, 443 Mich. 110, 503 N.W.2d 885, 897 (Mich. 1993). If it is determined that a petitioner seeking such an order has an adequate legal remedy by resort to the state appellate process, a complaint for an order of superintending control must be dismissed. See

M.C.R. 3.302(D)(2). Review in such cases is limited to questions of law. See id.

- - - - - - - - - - - - - - - -End Footnotes- - - - - - - - -

Tindall's continued nonpayment of child support resulted in the issuance of additional show cause orders and bench warrants. Several hearings were held at which Tindall was required to demonstrate why he should not be held in contempt for his open defiance of the court's orders. On one such occasion, a WCCC judge held Tindall in contempt of court and ordered him incarcerated for forty-five days, or until he made a $2000 payment towards his child support obligations. Tindall complied with the court's order and avoided incarceration. Thereafter, on August 24, 1998, the FOC served Tindall with a notice informing him that on September 8, 1998, it would seek an order suspending his license to practice law for his failure to pay court-ordered child support. Tindall filed no motion to quash the notice, failed to appear at the hearing, and did not otherwise raise a challenge to it in state court, but proceeded instead to federal court to file the lawsuit presently before us.

Tindall initiated the instant lawsuit in the United States District Court for the Eastern District of Michigan on September 4, 1998. Tindall's complaint set forth four claims, pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201, alleging that the License Act, which provides for the suspension of the driver's or occupational license of a delinquent child-support

payer, is unconstitutional, both facially and as applied by the WCCC and the FOC (Count III); that the procedures employed by the WCCC and the FOC to initiate contempt proceedings are unconstitutional (Count IV); that the procedures utilized by the WCCC and the FOC to issue bench warrants are unconstitutional (Count V); and that WCCC's referee hearings and judicial hearings [collectively referred to herein as "contempt proceedings"] are unconstitutional for their failure to comply with Michigan Court Rules (Count VI). Tindall sought an order from the district court declaring the contested statute and procedures unconstitutional; enjoining the named defendants from taking further action pursuant to the contested statute and procedures; and awarding him attorney fees and costs.

On or about September 28, 1998, Defendants filed separate motions to dismiss, and Tindall filed a cross-motion for summary judgment. After a hearing on the motions, the district court issued a judgment on September 30, 1999, and made the following findings: (1) because Tindall could not demonstrate that there had been any attempt by the WCCC or the FOC to enforce the License Act and suspend his law license, it abstained from ruling on the constitutionality of the statute (Count III); (2) because Tindall successfully demonstrated (without rebuttal by Defendants) that the FOC acted in bad faith by violating its established procedures for issuing show cause orders and bench warrants, no Younger abstention bar existed, and in the absence

of such a bar, both summary judgment on Counts IV and V and a declaratory judgment finding these practices unconstitutional were appropriate (Counts IV, V); and (3) with respect to the contempt proceedings, because Tindall failed to demonstrate that the FOC and the WCCC do not follow their established procedures for conducting contempt proceedings, and because he could not therefore demonstrate the requisite bad faith or flagrant unconstitutionality to overcome a Younger abstention bar, the district court abstained from ruling on this issue (Count VI). In short, the district court granted Tindall's motion for summary judgment on Counts IV and V and declined to rule on Counts III and VI, finding no exception to the Younger abstention doctrine.

II. DISCUSSION

The Younger abstention doctrine counsels a federal court to abstain from adjudicating a matter properly before it in deference to ongoing state criminal proceedings. See Younger v. Harris, 401 U.S. 37, 37-38, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971); see also Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432, 73 L. Ed. 2d 116, 102 S. Ct. 2515 (1982) (extending the doctrine to encompass civil and administrative proceedings). Three considerations have emerged for determining when abstention is appropriate: (1) whether the underlying proceedings constitute an ongoing state judicial proceeding; n4 (2) whether the proceedings implicate important state interests; and (3) whether there is an adequate opportunity in the

state proceedings to raise a constitutional challenge. Where a review of these considerations suggests that the state court should properly adjudicate the matter, a federal court should abstain and order the federal complaint dismissed. If, however, a plaintiff can demonstrate extraordinary circumstances such as bad faith, harassment, flagrant unconstitutionality, or another unusual circumstance warranting equitable relief, then a federal court may decline to abstain. See Fieger v. Thomas, 74 F.3d 740, 750 (6th Cir. 1996). A district court's decision to abstain from adjudicating a claim pursuant to the Younger doctrine is a question of law that we review de novo. See Cooper v. Parrish, 203 F.3d 937, 954 (6th Cir. 2000).

- - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n4 We have relaxed this requirement, noting that "even in the absence of a pending state proceeding . . ., a federal court cannot grant relief regarding unconstitutional practices which occur at a state trial." Parker v. Thomas, 626 F.2d 1, 10 (6th Cir. 1980).

- - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

In the instant case, the district court reviewed each of these factors and determined that it should properly abstain from considering Tindall's claims. It then proceeded to consider whether Tindall had satisfied any of the recognized Younger exceptions, and concluded that he had demonstrated, with

respect to Counts IV and V, bad faith on the part of FOC. Specifically, the district court found that the Defendants' failure to rebut Tindall's allegations that they failed to follow their established procedures for issuing show cause orders and bench warrants constituted an admission to the truth of those allegations. Such an admission, the district court concluded, was evidence of bad faith, thus removing any Younger bar to its consideration of those claims.

Defendants submit that the district court disregarded this Circuit's well-settled rule that "federal courts, absent 'extraordinary circumstances' must abstain from granting declaratory or injunctive relief [affecting a civil contempt hearing stemming from the nonpayment of child support] because doing so would involve unduly intrusive interference with, and monitoring of, the day-to-day conduct of state hearings and trials." Sevier v. Turner, 742 F.2d 262, 269-70 (6th Cir. 1984). We agree that the district court's failure to abstain contravened our holding in Sevier v. Turner, a case almost factually indistinguishable from the instant one.

In Sevier, plaintiff Freddie Sevier, a noncustodial parent obligated to pay child support for his minor children, sought injunctive and declaratory relief against various Tennessee juvenile judges and other family court officials. See Sevier, 742 F.2d at 264-65. Sevier alleged, inter alia, various due process violations stemming from the officials' alleged failure to inform him of certain rights to which he was

entitled at a civil contempt hearing (e.g., the right to counsel). See id. at 265-66. When he was unsuccessful in obtaining relief from the trial court, Sevier filed before the Tennessee Court of Appeals and the Tennessee Supreme Court Tennessee's equivalent of a motion for superintending control, seeking an extraordinary appeal from the trial court's adverse ruling. See id. at 266. Both appeals were denied, and Sevier then sought relief in federal court. See id. The district court dismissed his suit. See id. On appeal, relying on our decision in Parker v. Turner, 626 F.2d 1 (6th Cir. 1980), we abstained from adjudicating Sevier's injunctive- and declaratory-relief claims, finding that Sevier had failed to demonstrate "extraordinary circumstances" for federal court relief. See Sevier, 742 F.2d at 270.

The district court in this case never considered the impact of Sevier on Tindall's case, concluding that while the action might otherwise be barred, Defendants' bad faith provided a basis for reaching Counts IV and V of Tindall's complaint. We disagree with the district court's analysis and conclude that Sevier forecloses Tindall's action. Although the Supreme Court has recognized that bad-faith prosecution of an individual may serve as a proper exception to the Younger abstention doctrine, see, e.g., Middlesex County Ethics Comm., 457 U.S. at 435, we have found no Supreme Court case that has ever authorized federal intervention under this exception. Such cases thus are exceedingly rare, particularly where a plaintiff seeking to defeat an abstention argument has failed to avail himself first

of state appellate processes before seeking relief in federal court:

> The actions alleged to constitute evidence of bad faith on the part of the defendants in the instant appeal can all properly be challenged, either by motion to the trial court, or later on appeal to the state appellate courts. As such, Ballard plainly has an adequate opportunity to have [her] constitutional defenses heard and determined during the course of the state court proceedings. Where there exists the possibility of raising and correcting constitutional claims in state courts, the principles of federalism and comity expressed in Younger require that a criminal defendant must first exhaust his state appellate remedies before seeking relief in the District Court. Ballard v. Stanton, 833 F.2d 593, 594 (6th Cir. 1987) (emphasis added) (internal citations and quotation marks omitted). Here, it is undisputed that Tindall's only resort to Michigan courts for relief occurred when he filed his motions for superintending control before the Michigan Court of Appeals and the Michigan Supreme Court. Those appeals, without more, are insufficient to rebut the presumption in favor of abstention. See Sevier, 742 F.2d at 270-71.

The district court erred by folding into its inquiry of the abstention question consideration of whether Defendants had responded to the allegations set forth in Tindall's complaint. In resolving the threshold question of whether it should properly abstain from consideration of Tindall's claims, it

essentially made a merits determination -- that Defendants' failure to rebut the claims raised in Tindall's complaint constituted an "admission" entitling him to relief. We are not persuaded that a disputed admission is sufficient to demonstrate "extraordinary circumstances." Indeed, if we declined to find the requisite "extraordinary circumstances" to intervene in Sevier, where the plaintiff alleged injuries far more egregious than Tindall's, then a fortiori we are foreclosed also from reaching Tindall's claims. See 742 F.2d at 265-67 (discussing how the officials' alleged violations arguably resulted in incarceration of, financial hardship to, and job loss by Sevier).

III. CONCLUSION

For the foregoing reasons, we VACATE the judgment of the district court and REMAND this case with instructions to dismiss Tindall's complaint in its entirety.

Appendix C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

MICHAEL E. TINDALL, Plaintiff,

v.

WAYNE COUNTY FRIEND OF COURT, by: JOSEPH A. SCHEWE, DIRECTOR OF LEGAL SERVICES, and ALAN E. SKROK, STAFF ATTORNEY and ASSISTANT FRIEND OF COURT;

WAYNE COUNTY SHERIFF'S DEPARTMENT, by: ROBERT FICANO, SHERIFF;
WAYNE COUNTY CIRCUIT COURT, FAMILY DIVISION, by: KIRSTEN FRANK KELLY, PRESIDING JUDGE, MICHAEL F. SAPALA, CHIEF JUDGE, Defendants.

Case No. 98-CV-73896-DT

September 30, 1999, Decided

September 30, 1999, Filed

COUNSEL:
For MICHAEL E. TINDALL, plaintiff: Michael E. Tindall, Trombly, Tindall P.L.L.C., Port Huron, MI.

For WAYNE COUNTY FRIEND OF COURT, JOSEPH A. SCHEWE, ALAN E. SKROK, defendants: Margery M. Mann, Wayne County Friend of the Court, Detroit, MI.

For WAYNE COUNTY SHERIFF DEPARTMENT, defendant: Edward Ewell, Jr., Robert S. Gazall, Herman G. Petzold, III, Wayne County Corporation Counsel, Detroit, MI.

For KIRSTEN FRANK KELLY, MICHAEL F. SAPALA, defendants: Brian D. Einhorn, John M. Cooney, Collins, Einhorn, Southfield, MI.

For DAVID FINDLING, movant: David M. Findling, Royal Oak, MI.

JUDGES:
DENISE PAGE HOOD, United States District Judge.

OPINIONBY:
DENISE PAGE HOOD

OPINION:

MEMORANDUM OPINION AND ORDER

I. FACTS

Plaintiff Michael E. Tindall filed the instant suit under 42 U.S.C. @ 1983 claiming that his constitutional rights are being violated by the Defendants' enforcement of Plaintiff's child support

obligations. Plaintiff claims the following: 1) that M.C.L.A. @ 552.628 provides for an nconstitutional suspension of an occupational license (Count III); 2) that the show cause orders issued by the Friend of the Court and Wayne County Circuit Court are illegal (Count IV); 3) that the bench warrants issued by Defendants are illegal (Count V); and 4) that the referee and judicial hearings are illegal (Count V). n1

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - -

n1 Count I, entitled "Jurisdiction" does not state a claim but merely sets forth the jurisdictional basis of Plaintiff's Complaint. Count II, entitled "General Allegations," also does not state a specific claim but merely sets forth the factual basis of Plaintiff's claims found in Counts III through V.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - -

Plaintiff was divorced by a Judgment of Divorce entered in December 1991 by the Wayne County Circuit Court. From 1992 through the present, Plaintiff claims he has been the subject of about eight show cause orders issued by the Friend of the Court during referee and judicial hearings. Plaintiff claims he has been illegally incarcerated without proper notice, hearing, opportunity to defend or be represented by counsel. Plaintiff states that he has orally and in writing objected to the procedures before the Wayne County Circuit Court,

by complaint for Superintending Control in the Michigan Court of Appeals and by complaint for Superintending Control in the Michigan Supreme Court. These complaints were denied.

This matter is now before this Court on the various Defendants' Motion to Dismiss and Plaintiff's Motion for Summary Judgment. Responses were filed and a hearing was held on the matter.

II. ANALYSIS

A. Subject Matter Jurisdiction

1. Abstention Factors

Although not addressed by the parties, the Court must first determine whether it has subject matter jurisdiction over Plaintiff's Complaint. Plaintiff alleges Section 1983 claims in his Complaint. Inasmuch as Plaintiff is seeking federal review of a State Court order, this Court has no subject matter jurisdiction over such a claim.

A United States District Court has no authority to review final judgments of a state court judicial proceedings. Review of such judgments may be had in the United States Supreme Court. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983). To the extent that a District Court is requested to

review a State Court's order, the District Court lacks subject-matter jurisdiction over those complaints. Lower federal courts possess no power whatever to sit in direct review of state court decisions. If the constitutional claims presented to a United States District Court are inextricably intertwined with the state court's denial in a judicialproceeding of a particular plaintiff's complaint, then the district court is in essence being called upon to review the state-court decision, which the district court may not do. Id. at 483. To the extent that a general challenge to the constitutionality of a certain rule is alleged, the District Court does have subject-matter jurisdiction over those complaints. Id. at 482-483. The Feldman case involved a constitutional challenge to a state's regulation of lawyers. The Supreme Court in Feldman in determining whether or not a constitutional claim is inextricably intertwined to a state court's order in a judicial proceeding, stated:

... We have recognized that state supreme courts may act in a nonjudicial capacity in promulgating rules regulating the bar. (citations omitted). Challenges to the constitutionality of state bar rules, therefore, do not necessarily require a United States district court to review a final state-court judgment in a judicial proceeding. Instead, the district court may simply be asked to assess the validity of a rule promulgated in a nonjudicial proceeding. If this is the case, the district court is not reviewing a state-court judicial decision. In this

regard, 28 U.S.C. @ 1257 does not act as a bar to the district court's consideration of the case and because the proceedings giving rise to the rule are nonjudicial the policies prohibiting United States district court review of final state-court judgments are not implicated. United States district courts, therefore, have subject-matter jurisdiction over general challenges to state bar rules, promulgated by state courts in nonjudicial proceedings, which do not require review of a final state-court judgment in a particular case. They do not have jurisdiction, however, over challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional. Review of those decisions may be had only in this (U.S. Supreme Court) Court. 28 U.S.C. @ 1257. Feldman, 460 U.S. at 485-486. Federal courts require that a plaintiff raise his federal constitutional claims at the state level before the federal courts will review a state court's decision. The Supreme Court has noted the competence of state courts to adjudicate federal constitutional claims. Feldman, 460 U.S. at 483. Principles of equity, comity and federalism in certain circumstances counsel abstention in deference to ongoing state proceedings. Younger v. Harris, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971). In Younger, the Supreme Court held that a federal court should not interfere with a pending state criminal proceeding except in the rare situation where an injunction is necessary to prevent great

and immediate injury. Id. at 44. The Supreme Court has applied abstention to state civil proceedings which involve important state interests and to a variety of state administrative proceedings. Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423, 73 L. Ed. 2d 116, 102 S. Ct. 2515 (1982). The Supreme Court has enumerated a three-part test to determine abstention:

1) Whether the proceedings involved constitute an ongoing state judicial proceeding;
2) Do the proceedings implicate important state interests; and
3) Is there an adequate opportunity in the state proceedings to raise constitutional challenges?

Id. at 432.

2. Ongoing State Judicial Proceeding

In this case, the underlying proceeding involved is enforcement of Plaintiff's child support obligations under the divorce judgment entered by the Wayne County Circuit Court. If a state action is pending when the federal complaint was filed, the federal action must be dismissed. Hicks v. Miranda, 422 U.S. 332, 45 L. Ed. 2d 223, 95 S. Ct. 2281 (1975). Whether there is a pending state judicial proceeding, the Supreme Court has held that "[a] judicial inquiry investigates, declares and enforces

liabilities as they stand on present or past facts and under laws supposed already to exist." New Orleans Public Service, Inc. v. Council of the City of New Orleans, 491 U.S. 350, 370, 105 L. Ed. 2d 298, 109 S. Ct. 2506 (1989). So long as state court judicial review is available, Younger abstention applies. Fieger v. Thomas, 74 F.3d 740, 745 (6th Cir. 1996).

The first requirement of the Younger abstention has been met. There is no dispute that the state proceedings in this case involve the enforcement of Defendant's child support obligations under a divorce judgment entered by the Wayne County Circuit Court. Plaintiff has not shown that he has appealed any of the orders entered by the Wayne County Circuit Court. Plaintiff did file a Complaint of Superintending Control with the Michigan Court of Appeals and with the Michigan Supreme Court. The requests for Superintending Control sought a stay of the proceedings before the Wayne County Circuit Court and to determine the fitness of Judge William Giovan to preside over the case. (Exs. E and F to Plaintiff's Complaint) Both courts denied Plaintiff's Complaint for Superintending Control. In Michigan, superintending control is an extraordinary power that may be invoked when the plaintiff demonstrates the defendant's failure to perform a clear legal duty and the absence of an adequate legal remedy. In re Recorder's Court Bar Ass'n v. Wayne Circuit Court, 443 Mich. 110, 134, 503 N.W.2d 885 (1993). Superintending control orders are used to determine "if the inferior

tribunal, upon the record made, had jurisdiction, whether or not it exceeded that jurisdiction and proceeded according to law." In re People v. Burton, 429 Mich. 133, 139, 413 N.W.2d 413 (1994). The review by the Michigan appellate courts on a superintending control complaint is limited to questions of law and is not available when the plaintiff has an adequate legal remedy through an appeal. Id. When an appeal is available, the complaint for an order of superintending control must be dismissed. M.C.R. 3.302((D)(2). Appeal procedures to the Michigan Court of Appeals are governed by M.C.R. 7.200 et seq. and to the Michigan Supreme Court by M.C.R. 7.300 et seq.

The Court finds that there is currently a pending state judicial proceeding before the Wayne County Circuit Court involving Plaintiff's child support obligations under a divorce judgment. Plaintiff has not taken advantage of the appeal process to further adjudicate his disagreements with the Circuit Court's rulings, other than applying for superintending control which is not a substitute for the appellate process.

3. Important State Interests

The second prong of the abstention analysis has also been met. The state proceedings before the Wayne County Circuit Court-child support enforcement issues and domestic relations law-involve a paramount state interest. Mann v.

Conlin, 22 F.3d 100, 105 (6th Cir. 1994); Parker v. Turner, 626 F.2d 1, 3 (6th Cir. 1980).

4. Adequate Opportunity to Raise Constitutional Issues

The third requirement for abstention-that there be an adequate opportunity in state proceedings to raise constitutional challenges-has also been met.Abstention is appropriate unless state law clearly bars the interposition of the constitutional claims. Moore v. Sims, 442 U.S. 415, 425-26, 60 L. Ed. 2d 994, 99 S. Ct. 2371 (1979). The burden rests on the federal plaintiff to show that state procedural law barred presentation of the plaintiff's claims. Id. at 432.

As discussed above, Plaintiff has the opportunity to challenge the constitutionality of the procedures through the Michigan appellate courts. Plaintiff has not shown that he has challenged Defendants' procedures based on constitutional reasons before the Wayne County Circuit Court-in the form of motions--let alone before the Michigan appellate courts. Plaintiff's Complaints for Superintending Control do not address the constitutional challenges he has brought before this Court. The Michigan Courts have not had the opportunity to review Plaintiff's constitutional challenges to the procedures before the Wayne County Circuit Court nor the constitutionality of M.C.L.A. @ 552.628 which authorizes the Michigan circuit courts to

suspend an occupational license where an individual is in arrearage under a child support order exceeding three months. Plaintiff, an attorney, is capable of presenting constitutional issues before the Michigan courts, as evidenced by the documents he has submitted before this Court. There has been no showing that the rules and procedures established in Michigan bar Plaintiff from presenting his constitutional claims before the Michigan courts.

B. Exceptions to Abstention

1. Plaintiff's claims of constitutional violations

A federal court normally orders a complaint dismissed if the three requirements for Younger abstention are met unless a plaintiff can show an exception from abstention such as bad faith, harassment, or flagrant unconstitutionality. Fieger, 74 F.3d at 750. The Younger Court has stated that "the possible unconstitutionality, of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it," especially absent "any showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief." Younger, 401 U.S. at 54. Any challenged statute must be "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." Id. at 53-54.

Plaintiff claims that he has shown that Defendants' actions to enforce child support orders were made in bad faith. Plaintiff states that Defendants are acting in bad faith by blindly and blatantly ignoring the constitutional principles established by the federal constitution which are recognized in Michigan. Plaintiff addresses three instances where Defendants have violated his constitutional rights.

The first instance is that the Friend of the Court personnel, with the Circuit Court's complicity- issues show cause orders which are pre-printed, pre-signed by the Circuit Court judge, without review by Mr. Joseph A. Schewe for the Friend of the Court or a Circuit Court judge. Plaintiff states that he does not specifically challenge the constitutionality of the Friend of the Court and Enforcement Acts but that because the Friend of the Court does not follow the rules and statutes, his Fourth Amendment rights to procedural due process have been violated.

The second instance in which Plaintiff claims a violation of his constitutional rights is that the Friend of the Court personnel and the Circuit Court do not follow the rules and procedures in handling contempt proceedings. Plaintiff claims that he was not given alternatives to incarceration under M.C.L.A. @@ 552.635 and 552.637 nor given notice as to the standard of proof the contemnor

must meet to rebut the statutory presumption under M.C.L.A. @ 552.633. Plaintiff claims that if the Friend of the Court attorney is not satisfied with any offers by the party in arrears, a hearing before a referee is then immediately conducted. Plaintiff states that the referee hearing is conducted on hearsay statements from the Friend of the Court attorney, no evidence or testimony is taken, no cross examination is allowed, and the rules of evidence are not applied or enforced nor findings of fact or conclusions are made, as required by M.C.R. 3.215(E). If either party objects to the referee's oral decision, the parties are ordered to immediately appear before a Wayne County Circuit Court judge. The Friend of the Court attorney then orally recites to the judge what he claims the referee decided earlier. Neither the judge nor the parties are provided a written referee recommendation. Neither the parties nor the Friend of the Court attorney is sworn to testify before the Judge. The rules of evidence are not followed by the judge nor cross-examination allowed. The alleged contemnor is not advised by the judge of his right to counsel nor the existence of statutory alternatives to incarceration. Plaintiff claims the hearing usually lasts less than ten (10) minutes and usually results in the incarceration of the alleged contemnor.

The third instance of violation of Defendant's constitutional rights is that the Circuit Court may restrict Plaintiff's ability to work under M.C.L.A. @ 552.628. This statute allows the Circuit Court to

suspend a professional license if child support obligations are not met. Plaintiff argues that M.C.L.A. @ 552.628 violates his substantive and procedural due process rights.

Plaintiff submitted documentary evidence and an affidavit to support his arguments. Defendants submitted no documentary evidence to rebut Plaintiff's factual allegations that the Friend of the Court personnel and the Circuit Court do not follow the statutory provisions or the court rules. Defendants declined to submit any evidence or testimony from the Court at the hearing.

2. Pre-printed, Pre-Signed Order to Show Causes and Bench Warrants

As noted previously, Defendants have not submitted any evidence to rebut Plaintiff's evidence that the Friend of the Court, without review by a Circuit Court judge, issues a bench warrant at will. Plaintiff has presented sufficient evidence to support his allegation that the Friend of the Court personnel, with the Circuit Court's complicity, issues show cause orders which are pre-printed, pre-signed by the Circuit Court judge.

Plaintiff submitted bench warrants issued by the Circuit Court which he claims are pre-printed and issued without review and without the actual signature of a Circuit Judge. Attached to Plaintiff's Complaint, is a transcript of a May 14, 1997 Show

Cause Hearing where the Friend of the Court attorney, Shelly A. Payne, admits to issuing a bench warrant for August 21,1996. (5/14/97 hrg., p. 4) When the Court asked Ms. Payne, "who authorized the bench warrant" Ms. Payne responded, "I did." (5/14/97 hrg. p. 9) The court then asked, "Can you do [sic] on your own?" Ms. Payne responded, "Yes, I do that all the time. There's a failure to appear the Friend of the Court has the power to issue a bench warrant for failure to appear." (5/14/97 hrg. p. 9)

M.C.L.A. @ 552.501 et seq. and M.C.R. 3.208 set forth the Friend of the Court's powers and duties. M.C.R. 3.208(B) regarding enforcement states as follows:

(B) Enforcement. The friend of the court is responsible for initiating proceedings to enforce an order or judgment for support, visitation, or custody.

(1) If a party has failed to comply with an order or judgment, the friend of the court may petition for an order to show cause why the party should not be held in contempt.

(2) The order to show cause must be served personally or by ordinary mail at the party's last known address.

(3) The hearing on the order to show cause may be held no sooner than seven days after the order is served on the party. If service is by ordinary mail, the hearing may be held no sooner than nine days after the order is mailed.

(4) If the party fails to appear in response to the order to show cause, the court may issue an order for arrest.

M.C.R. 3.208(B) (italics added). M.C.L.A. @ 552.631(1) state as follows:

(1) If any person has been ordered to pay support under a support order and fails or refuses to obey and perform the order, and if an order of income withholding is inapplicable or unsuccessful, a recipient of support or the office of the friend of the court may commence a civil contempt proceeding by filing in the circuit court a petition for an order to show cause why the delinquent payer should not be held in contempt. If the payer fails to appear in response to an order to show cause, the court may issue a bench warrant requiring that the payer be brought before the court without unnecessary delay to answer and plead that neglect or refusal. M.C.L.A. @ 552.631(1) (italics added).

Based on the unrebutted evidence submitted by Plaintiff, the Court finds that Plaintiff has submitted sufficient evidence to support his claim that it is the Wayne County Friend of the Court's

practice to issue orders to show cause and bench warrants using pre-printed forms with the judge's signature already affixed without the judge's review and approval as required by M.C.R. 3.208(B) and M.C.L.A. @ 552.631. Plaintiff's Complaint and affidavit stating that no Circuit Court judge reviews or actually signs the show cause orders and the bench warrants is unrebutted. No evidence to the contrary was submitted by Defendants, even after the Court invited Defendants to do so at the hearing. n2 Plaintiff has met the exception to abstention on the ground that Defendants have violated Plaintiff's due process rights under the Fourth Amendment, guaranteed by the Fourteenth Amendment, by failing to follow the procedures set forth in M.C.R. 3.208(B) and M.C.L.A. @ 552.631. An individual's right to liberty is at stake when contempt proceedings are initiated by the Friend of the Court. The Friend of the Court's actions, without actual approval by the Circuit Court judges, are outside the statutory mandate of M.C.L.A. @ 552.641 and M.C.R. 3.208(B).

- - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n2 Although the Court must view the motion in the light most favorable to the nonmoving party, where "the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574,

586, 89 L. Ed. 2d 538, 106 S. Ct. 1348(1986); Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

- - - - - - - - -End Footnotes- - - - - - - - - - - - - - -

3. Contempt Proceedings

Plaintiff has not submitted sufficient evidence to support his allegations that the Friend of the Court personnel and the Circuit Court do not follow the rules and procedures in handling contempt proceedings. Plaintiff has also not submitted sufficient evidence to show that Plaintiff was not given alternatives to incarceration under M.C.L.A. @@ 552.635 and 552.637 nor given notice as to the standard of proof the contemnor must meet to rebut the statutory presumption under M.C.L.A. @ 552.633. Plaintiff has failed to submit sufficient evidence to show that the rules of evidence are not followed by the referee or the Circuit Court.

M.C.L.A. @ 552.633 allows the court to find a payer in contempt "if the court finds that the payer is in arrears and if the court is satisfied that the payer has the capacity to pay out of currently available resources all or some portion of the amount due under the support order." Upon finding a payer in contempt, the court has the discretion to enter an order which includes committing the payer to the county jail. M.C.L.A. @ 552.633(1)(a)-(e). M.C.L.A. @ 552.635(1) allows the court to find a

payer with capacity to pay arrearage in contempt "if the court is satisfied that by the exercise of diligence the payer could have the capacity to pay all or some portion of the amount due under the support order and that the payer fails or refuses to do so." Upon finding a payer in contempt, the court has the discretion to enter an order, including committing the payer to the county jail. M.C.L.A. @ 552.635(2)(a)-(c). M.C.L.A. @ 552.637 sets forth the provisions of the order of commitment pursuant to M.C.L.A. @@ 552.633 and 552.635. Nothing in these three statutes require a judge to notify a payer as to the alternatives which may be found in these statutes.

Plaintiff has not submitted any evidence, other than Plaintiff's conclusory allegations, to support his allegations that the rules of evidence are not followed during the hearings before the friend of the court, the referee or the circuit court judge. Disagreements with a judge's findings under M.C.L.A. @@ 552.633, 552.635 and 552.637 and any disputed evidentiary issues before the Friend of the Court, the Referee or the Circuit Court judge may be brought before the state and appellate courts. None of these allegations are "flagrantly and patently violative of express constitutional prohibitions" as required by the Younger abstention doctrine. Younger, 401 U.S. at 53-54. The Court will abstain from ruling on these issues.

4. M.C.L.A. @ 552.628

The Court will not address the issue that M.C.L.A. @ 552.628 is unconstitutional because Plaintiff has not been subjected to the provisions of that statute. Plaintiff has not shown that there is a subject matter in controversy regarding the constitutionality of M.C.L.A. @ 552.628. As the Supreme Court stated in Younger, "the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it." Here, there has been no allegation that any attempts have been made to implement the statute. The Court will abstain from ruling on the constitutionality of M.C.L.A. @ 552.628 because Plaintiff has not shown any attempt to enforce the statute.

C. Anti-Injunction Statute

Defendants Michael F. Sapala and Kirsten Frank Kelly claim that 28 U.S.C. @ 2283 expressly forbids injunctive relief against judicial officers. 28 U.S.C. @ 2283 states:

A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. The Supreme Court in Mitchum v. Foster, 407 U.S. 225, 242, 32 L. Ed. 2d 705, 92 S. Ct. 2151 (1972), found that Section 1983 is an explicit exception to the

anti-injunction statute. The Sixth Circuit expressly adopted those Supreme Court findings in Martin-Marietta Corp. v. Bendix Corp., 690 F.2d 558, 562 (6th Cir. 1982).

Because Plaintiff filed a suit in this Court pursuant to 42 U.S.C. @ 1983, the anti-injunction statute, 28 U.S.C. @ 2283, is inapplicable to the instant case. However, for the reasons set forth below, injunctive relief is not available to Plaintiff.

D. Absolute Immunity

Alternatively, the Wayne County Circuit Court judges and the Friend of the Court employees claim they are absolutely immune from the suit. Plaintiff agrees that judicial officers and friend of the court employees are absolutely immune from claims for monetary damages under Section 1983 while acting in their official capacities. Plaintiff does not seek damages. Plaintiff seeks a declaration that the enforcement hearings and procedures conducted by the friend of the court and its referees are unconstitutional.

It is well settled that judicial officers are absolutely immune from claims for damages under Section 1983. Imbler v. Pachtman, 424 U.S. 409, 47 L. Ed. 2d 128, 96 S. Ct. 984 (1976). Friend of the Court employees are also absolutely immune from claims for damages whether acting as judicial designees, including referees or as prosecutors,

such as Friend of the Court attorneys seeking enforcement of child custody and support orders. Watts v. Burkhart, 978 F.2d 269 (6th Cir. 1972). In Pulliam v. Allen, 466 U.S. 522, 541-42, 80 L. Ed. 2d 565, 104 S. Ct. 1970 (1984), the Supreme Court held that judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in his/her judicial capacity. Equitable relief against a judge, as with any other defendant, is limited to cases where there is "a showing of an inadequate remedy at law and of a serious risk of irreparable harm. ..." Pulliam, 466 U.S. at 537.

On October 19, 1996, Public Law 104-317, the Federal Courts Improvement Act of 1996, was signed in to law. Section 309 of the Act amended 42 U.S.C. @ 1983 as follows:

> In any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. 42 U.S.C. @ 1983 (italics added);Kampfer v. Scullin, 989 F. Supp. 194, 201(N.D. N.Y. 1997).

Absolute immunity bars not only a Section 1983 claim for damages but with the amended language the immunity extends to a Section 1983 claim for injunctive relief, unless a declaratory decree was violated or declaratory relief is unavailable. Montero

v. Travis, 171 F.3d 757, 761 (2nd Cir. 1999); Hili v. Sciarrotta, 140 F.3d 210, 215 (2nd Cir. 1998); Ackermann v. Doyle, 43 F. Supp. 2d 265, 272 (E.D. N.Y. 1999).

The legislative history of P.L. 104-317 clearly indicates that Congress intended to protect judicial officers from Section 1983 claims for injunctive relief, as well as damages. The Senate Report on the bill states:

This section restores the doctrine of judicial immunity to the status it occupied prior to the Supreme Court's decision in Pulliam v. Allen, 466 U.S. 522, 80 L. Ed. 2d 565, 104 S. Ct. 1970 (1984) .

In Pulliam, the Supreme Court broke with 400 years of common-law tradition and weakened judicial immunity protections. The case concerned a State magistrate who jailed an individual for failing to post bond for an offense which could be punished only by a fine and not incarceration. The defendant filed an action under 42 U.S.C. 1983, obtaining both an injunction against the magistrate's practice of requiring bonds for nonincarcerable offenses, and an award of costs, including attorney's fees. The Supreme Court affirmed, expressly holding that judicial immunity is not a bar to injunctive relief in section 1983 actions against a State judge acting in a judicial capacity, or to the award of attorney's fees under the Civil Rights Attorney Fees Award Act, 42 U.S.C.

1988. Those statutes are now amended to preclude awards of costs and attorney's fees against judges for acts taken in their judicial capacity, and to bar injunctive relief unless declaratory relief is inadequate.

Subsection 311(c)[Senate version of Section 309] amends 42 U.S.C. 1983 to bar a Federal judge from granting injunctive relief against a State judge, unless declaratory relief is unavailable or the State judge violated a declaratory decree. ...

This section does not provide absolute immunity for judicial officers. Immunity is not granted for any conduct "clearly in excess" of a judge's jurisdiction, even if the act is taken in a judicial capacity. Moreover, litigants may still seek declaratory relief, and may obtain injunctive relief if a declaratory decree is violated or is otherwise unavailable. Section 311 restores the full scope of judicial immunity lost in Pulliam and will go far in eliminating frivolous and harassing lawsuits which threaten the independence and objective decision-making essential to the judicial process. P.L. 104-317, Senate Report No. 104-366, Sept. 9, 1996.

It is clear that Congress amended Section 1983 to limit suits against judicial officers absent a showing that the judicial officer violated a declaratory decree or there is no declaratory decree available. In this case, there is no allegation that the judicial officers have violated a declaratory decree. Plaintiff sought

declaratory relief, in addition to injunctive relief, which is available pursuant to 28 U.S.C. @ 2201. Since there is no allegation that the judicial officers in this case have violated a declaratory decree, absolute judicial immunity bars Plaintiff's request for injunctive relief pursuant to 42 U.S.C. @ 1983. Based on the amendment to 42 U.S.C. @ 1983, it appears that the anti-injunction statute, 28 U.S.C. @ 2283 now applies to 42 U.S.C. @ 1983 claims with the limitations set forth in Section 1983. Plaintiff's claim for injunctive relief is denied.

E. Declaratory Relief

1. Five Factors

As noted previously, in addition to injunctive relief, Plaintiff has sought declaratory relief. 28 U.S.C. @ 2201 provides in pertinent part:

In a case of actual controversy within its jurisdiction ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declarations, where or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

The Declaratory Judgment Act "is an enabling Act, which confers discretion on the courts rather than

an absolute right upon the litigant." Allstate Ins. v. Mercier, 913 F.2d 273, 277 (6th Cir. 1990). In the Sixth Circuit, five factors are generally considered and weighed before declaratory relief may be granted:

1) whether the declaratory action would settle the controversy; 2) whether the declaratory action would serve a useful purpose in clarifying the legal relations in issue; 3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for res judicata"; 4) whether the use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and 5) whether there is an alternative remedy which is better or more effective. Id.

2. First Factor / Settle the Controversy

The only claim remaining in this case is whether Defendants violated Plaintiff's due process constitutional rights when the Friend of the Court personnel, without the Circuit Court's review, issued show cause orders which are pre-printed and pre-signed by the Circuit Court judge but are not reviewed pursuant to M.C.R. 3.208(B) and M.C.L.A. @ 552.631. Plaintiff claims a liberty interest created by the state court rules and statutes under the due process clause. Plaintiff does not claim that M.C.R. 3.208(B) and M.C.L.A. @

552.631 are unconstitutional but that Defendants failed to follow the procedures outlined under the rule and statute.

A liberty interest due process claim was considered by the Supreme Court in Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979). The Supreme Court noted:

[A] person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend. ... The most elemental of due process rights [is] freedom from a wholly arbitrary deprivation of liberty.

Id. at 319. A violation of a state's formal procedure does not in and of itself implicate constitutional due process concerns. Levine v. Torvik, 986 F.2d 1506, 1515 (6th Cir. 1993). "A state cannot be said to have a federal due process obligation to follow all of its procedures; such a system would result in the constitutionalizing of every state rule, and would not be administrable." Id. The proper inquiry is "whether the state's procedures have passed federal constitutional muster, not whether there was an error in the state's applying its own law." Id. To establish a due process claim violation under the constitution, it must be shown that "the state court's application of its constitutionally adequate standard was so

erroneous as to raise an independent due process violation." Id.

Based on the unrebutted evidence submitted by Plaintiff, he has established that Defendants' application of the state procedural rules violated his due process right. When show cause orders and bench warrants for a person's arrest are issued against a person, that person is facing a loss of liberty which the state cannot impose without notice and a meaningful opportunity to defend. The rules set forth in M.C.R. 3.208(B) and M.C.L.A. @ 552.631 were enacted to protect a person's right to proper notice and to have independent review of the show cause order and bench warrant, other than that of Friend of the Court personnel who prosecute arrearage claims. The issuance of show cause orders and bench warrants on pre-printed form with the judge's signature already affixed to the form at the discretion of Friend of the Court personnel and without subsequent review by a judge violates Plaintiff's due process rights under the Fourth Amendment, guaranteed by the Fourteenth Amendment.

The Court's declaration that Defendants' failure to follow the procedures set forth in M.C.R. 3.208(B) and M.C.L.A. @ 552.631 violated Plaintiff's due process rights settles the controversy between Plaintiff and the Defendants as to whether Plaintiff's due process rights have been violated.

3. Balancing of the Remaining Factors

The Court's declaration clarifies the legal relations in issue. The Court's declaration establishes Defendants' duties toward Plaintiff and shows that Defendants should meaningfully follow the procedures set forth in M.C.R. 3.208(B) and M.C.L.A. @ 552.631 before issuing show cause orders or bench warrants.

There may be some showing that Plaintiff is using this action for the purpose of "procedural fencing" in that Plaintiff may wish to avoid child support payments as ordered by the state court. The Court has made it clear that the Court will not disturb any findings by the Circuit Court on the issue of child support payments. The sole issue before this Court is the due process constitutional violation noted above.

The Court does not find that declaratory relief would increase friction between our federal and state courts and improperly encroach upon state jurisdiction. This Court's sole focus is whether Defendants have violated Plaintiff's due process rights by failing to meaningfully follow the procedures set forth in M.C.R. 3.208(B) and M.C.L.A. @ 552.631. The Court makes no finding as to the appropriateness of the child support order issued and any prosecution to collect under the order so long as Plaintiff's due process rights are protected.

No other alternative has been presented by Defendants as to how to correct the violation of Plaintiff's due process rights. The only apparent way to correct the due process violation is to follow the procedures set forth in M.C.R. 3.208(B) and M.C.L.A. @ 552.631. The Court's finding that Defendants have failed to follow these procedures should put Defendants on notice that the procedures they have been following violate Plaintiff's due process rights. The Circuit Court was made aware that Friend of the Court personnel issued the show cause orders and bench warrants without review by a judge. Defendants did not produce any evidence to rebut Plaintiff's evidence.

Weighing the factors involved, the Court finds that a declaratory judgment should be issued in this action. The Court declares that the Friend of the Court's practice to issue show cause orders and bench warrants without actual review by a judge and Defendants' failure to follow the procedures set forth in M.C.R. 3.208(B) and M.C.L.A. @ 552.631 violate Plaintiff's due process rights.

III. CONCLUSION

For the reasons set forth above, the Court declares that the Friend of the Court's practice to issue show cause orders and bench warrants without actual review by a judge and Defendants' failure to follow the procedures set forth in

M.C.R. 3.208(B) and M.C.L.A. @ 552.631 violate Plaintiff's due process rights. As to the remaining claims, the Court abstains from considering those issues.

Accordingly,

IT IS ORDERED that Defendant Sapala's Motion to Dismiss (Docket No. 12, filed September 25, 1998) is GRANTED IN PART and DENIED IN PART as more fully set forth above.

IT IS FURTHER ORDERED that Defendant Kelly's Motion to Dismiss (Docket No. 13, filed September 28, 1998) is GRANTED IN PART and DENIED IN PART as more fully set forth above.

IT IS FURTHER ORDERED that Plaintiff's Motion for Summary Judgment (Docket No. 15, filed September 28, 1998) is GRANTED IN PART and DENIED IN PART as more fully set forth above.

IT IS FURTHER ORDERED that Plaintiff's Motion to Supplement Complaint (Docket No. 27, filed March 24, 1999) is MOOT.

IT IS FURTHER ORDERED that Defendant Wayne County Friend of the Court's Motion to Quash Plaintiff's Subpoena (Docket No. 32, filed April 2, 1999) is MOOT.

IT IS FURTHER ORDERED that Defendants Sapala and Kelly's Motion to Quash Findling Subpoena and for Protective Order (Docket Nos. 36-1 and 36-2, filed April 5, 1999) is MOOT.

IT IS FURTHER ORDERED that Plaintiff's Motion to Compel Production of Documents and Deposition of Subpoenaed Witness (Docket No. 37, filed April 6, 1999) is MOOT.

IT IS FURTHER ORDERED that Declaratory Judgment is entered in favor of Plaintiff as to the due process claim on Defendants' application of the rules and procedures set forth in M.C.R. 3.208(B) and M.C.L.A. @ 552.631 only as more fully set forth above.

IT IS FURTHER ORDERED that the Court ABSTAINS as to the Plaintiff's remaining claims and those claims are DISMISSED.

IT IS FURTHER ORDERED that Plaintiff's request for injunctive relief is DENIED.

DENISE PAGE HOOD
United States District Judge
DATED: SEP 30 1999

Appendix D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL E. TINDALL,
Plaintiff

V. Case No. 98-CV-73896-DT

HONORABLE DENISE PAGE HOOD

WAYNE COUNTY FRIEND OF COURT, By: JOSEPH A. SCHEWE, DIRECTOR OF LEGAL SERVICE, and ALAN E. SKROK, STAFF ATTORNEY and ASSISTANT FRIEND OF COURT; WAYNE COUNTY SHERIFF'S DEPARTMENT, by: ROBERT FICANO, SHERIFF; WAYNE COUNTY CIRCUIT COURT, FAMILY DIVISION, by: KIRSTEN FRANK KELLY, PRESIDING JUDGE, MICHAEL F. SAPALA, CHIEF JUDGE,

Defendants.
_____/

MEMORANDUM
OPINION AND

ORDER

I. BACKGROUND

On September *30,* 1999, the Court entered a Memorandum Opinion and Order and Judgement in this case. The Court abstained from all of Plaintiff's claims, except for Count V, as to the due process claim only. The Court entered Judgment against Defendants Wayne County Circuit Court. Judges and Friend of the Court personnel ("Defendants") on Count V.

The Court denied Defendants' Motion for Enlargement of Time as untimely. Defendants thereafter filed a Motion for Relief from Judgment under Fed. R. Civ. P. 60(b). Plaintiff at first objected to the Rule 60(b) motion stating that the Court was without jurisdiction to address the motion but Plaintiff later withdrew his objection. As noted in this Court's order denying Defendants' Motion for Enlargement of Time, the Sixth Circuit has determined that motions under Rule 60(b) must be filed within a reasonable time after judgment has been entered. Generally. the Sixth Circuit disfavors Rule 60(b) motions filed after an appeal period has run. The interests of finality of judgments and judicial economy outweigh the value of giving a party a second bite at the apple by allowing a rule 60(b) motion after an appeal period has run. *Pierce v. United Mine Workers of America Welfare,* 770 F.2d 449, 451-452(6th Cir. 1985).

Here, Defendants filed their Motion under Rule 60(b) in conjunction with their Notice of Appeal on November 1, 1999. The Court will consider Defendants' Motion for Relief from Judgment since it was filed before the appeal period had run. It should be noted that Defendants object to Plaintiffs response to their Motion for Relief from Judgment as untimely filed. Plaintiff filed an "objection" to Defendants' Motion for Relief from Judgment, on November 3, 1999. which was within the response time for filing responses under Local Rule 7.1. Plaintiffs response was filed on November 29, 1999, at which time he withdrew his previously filed "objections." Even though Plaintiff is an attorney, he is proceeding pro se and the Court will consider Plaintiffs response filed as a substitute for his "objections." Defendants have not shown they will be prejudiced by the Court's consideration of the response, especially since Defendants now want the Court to consider an affidavit filed long past the time summary judgment motions were heard.

II. DEFENDANTS' MOTION FOR RELIEF FROM JUDGMENT

A. Fed. R. Civ. P. 60(b)

Fed. R. Civ. P. 60(b) in pertinent part states:

> (b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court

> may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence. surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule *59(b);* (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party *(4~* the judgment is void: (5' the judgment has been satisfied. released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Fed. R. Civ. P. 60(b).

Defendants have stated three arguments in support of their Motion for Relief from Judgment. First, Defendants claim that the Judgment against Defendants is void because the Court lacks subject matter jurisdiction over the Complaint. Although not

expressly identified by Defendants, the Court assumes that Defendants are seeking relief under Fed. R. Civ. P. 60(b)(4). Second, Defendants claim that the Judgment was based on a mistake in the application of the law. The Court assumes that Defendants are seeking relief under Fed. R. Civ. P. 60(b)(1) since Defendants again did not expressly identify the specific rule. Third, Defendants claim the Judgment was based on a mistake of fact by the Court. Again, the Court assumes Defendants are seeking relief under Fed. R. Civ. P. 6O(b)(1).

B. Fed. R. Civ. P. 60(b)(4)/Judgment is Void

Relief from judgment can be had under Fed. R. Civ. P. 60(b)(4) if the Judgment entered is void. Defendants claim that the Judgment is void because there is no case and controversy at issue.

It is noted that Defendants did not raise this issue in any of their papers prior to the instant motion. Even if neither party addresses the jurisdictional issue, the federal courts are under an independent obligation to examine their own jurisdiction. *Jenkins* v. *McKeithen, 395* U.S. 411. 421 (1969). The Court has a threshold duty in every case to determine whether it has subject matter jurisdiction over the controversy before it. whether or not the parties have preserved for appeal a challenge to the Court's jurisdiction. *In re Wolverine Radio Co.,* 930 F.2d 1132, 1137-38(6th Cir. 1991). The Court will address this issue at this time.

Article Ill. section 2 of the United States Constitution confines federal court jurisdiction to cases and controversies. *Arizonans for Official English v. Arizona,* 520 U.S. *43,* 117 S.Ct. 1 *055.* 1067, 137 L.Ed.2d 170 (1997). Merely because a party asks a federal court to declare his/her legal rights, the case-or-controversy requirements of Article 111 are not satisfied. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 471 (1982). Federal courts are prohibited from issuing advisory opinions. *SEC v. Med. Comm. for Human Rights,* 404 U.S. 403, 407 (1972). Federal courts require that a party has standing to institute an action. *Valley Forge,* 454 U.S. at 471.

Standing involves two levels of inquiry. The first is whether the plaintiff has shown, at a minimum, some actual or threatened injury resulting from the alleged illegal action. *Id.* at 472. The second is whether the plaintiff is the proper proponent of the rights in which the action is based. *Singleton v. Wulff* 428 U.S. 106, 112-113 (1976).

Under the "injury" requirement, a plaintiff must show more than abstract injury. A plaintiff must show that he/she "has sustained or is immediately in danger of sustaining some direct injury" as a result of the challenged statute or official conduct. *Valley Forge, 454* U.S. at 476-7S. The injury or threat of injury must be both "real and immediate, "not" conjectural" or "hypothetical." O*'Shea v. Littlelon.* 414 U.S. 488, 494 (1974). Past exposure to illegal conduct, without a showing of continuing and

present adverse affects, does not meet the injury requirement. *Id.* at 495-496.

In Parker v. Turner. 626 F.2d 1 (6th Cir. 1980). a child support case, the plaintiffs were found to have standing because they claimed that they could not afford to make support payments and would likely face future contempt proceedings. Plaintiffs claimed that the procedures in enforcing their child support obligations were unconstitutional. Defendants claim that Plaintiff cannot show that he cannot make future payments because he is a lawyer, thus, Plaintiff is not facing future contempt proceedings.

There is no dispute that Plaintiff has been the subject of previous contempt proceedings. In this case, Plaintiff asserted in his Complaint and continues to assert that the Friend of the Court has erroneously and continuously overstated his child support obligations. Based on the alleged erroneous entries, Plaintiff claims he would face future contempt proceedings because he does not agree with the Friend of the Court's assessments of his child support obligations. Given Plaintiffs allegation that he does not agree with the Friend of the Court's assessments and that he would be facing future contempt proceedings, Plaintiff has established the minimum requirement of standing in this case.

Defendants cite *Johnson v. Turner,* 125 F.3d 324 (6th Cir. 1997) to support their argument. The *Johnson* case involved consolidated cases which challenged the procedures in a paternity action and

enforcement of child support obligations. The Sixth Circuit found that in paternity actions, because such actions involve a one-time judgment of paternity, the plaintiffs could not demonstrate injury because they could not show that they would be subject to future paternity actions. The Sixth Circuit found that in the absence of evidence that the plaintiffs will again be subject to paternity proceedings. the plaintiffs had no interest in the challenged statutes and proceedings. The Sixth Circuit found no standing in that case. As to the plaintiffs involved in child support payments. because the plaintiffs had not demonstrated that they could not make future support payments, the Sixth Circuit found that plaintiffs did not have the necessary standing to seek injunctive and declaratory relief. *Johnson,* 125 F.3d at 338-339.

Here. Plaintiff's child support obligation is not a one-time issue but a continuing issue. Plaintiff has alleged that the Friend of the Court's assessments are erroneous, thus, he would be subject to future contempt proceedings. Plaintiff has standing in the case before the Court. Plaintiff has satisfied the case-in-controversy requirement under Article III of the Constitution.

C. Fed. R. Civ. P. 60(b)(1)/Mistake as to Application of Law

The Sixth Circuit has stated that "mistake" as used in Rule 60(b)(1) encompasses any type of mistake or error on the part of the court. *Barrier v. Beaver,* 712 F.2d 231, 234 (6th Cir. 1983). A district

court abuses its discretion when it relies on clearly erroneous findings of fact. or when it improperly applies the law, or uses an erroneous legal standard. *Rornstadt v. Allstate Ins. Co.,* 59 F.3d 608, 615 (6th Cir. *1995).*

Defendants claim that the Court misinterpreted the "bad *faith"* exception to the abstention doctrine as enunciated in *Younger* v. *Harris,* 401 U.S. 37 (1971). Defendants argue that the state courts can adequately address the alleged bad faith actions in the state appellate courts. Defendants cite *Parker,* to support their argument. In *Parker,* the Sixth Circuit affirmed the district court's decision to abstain from the case holding that the plaintiffs, indigent fathers, could not seek federal court relief for their claims that the state courts denied them due process of law by denying them the right to counsel. the right to confront and cross-examine witnesses, and the right to testify and present witnesses on their own behalf. *Parker,* 626 F.2d at 2. The Sixth Circuit found that for the federal courts to adjudicate the suit would result in "significant and unacceptable interference in the state judicial process," which might include ongoing supervision of the state court. *Id.* at 3.

In response. Plaintiff argues that if the state court is to determine the bad faith exception under the *Younger* abstention doctrine, there would be no bad faith exception. Plaintiff claims that the bad faith issue is an issue for the federal courts, and not the state courts. A party must exhaust his state court appellate remedies unless he/she can bring himself

within the exceptions specified in *Younger. Hoffman v. Peruse,* 420 U.S. *592,* 608 *(1975).*

The Court's September 30, 1999 Memorandum Opinion and Order thoroughly went through the *Younger* abstention requirements and its applicability to Plaintiffs claims. (9/30/99 Opinion, pp. 2-14) The Court found that based on the evidence submitted by Plaintiff which was unrebutted by Defendants, Plaintiff had shown that Defendants acted in bad faith in enforcing child support orders when pre-printed, pre-signed orders to show cause and bench warrants were issued without review by a Circuit Court judge. The Court noted that when the Friend of the Court initiates contempt proceedings, an individual's right to liberty is at stake. The Friend of the Court (with the complicity of the Wayne County Circuit Court) by issuing orders to show cause and bench warrants without independent judicial review and outside the statutory mandate of M.C.L.A § *552.64* 1 and M.C.R. 3.208(B), violated Plaintiffs due process rights. In its opinion, the Court did not enjoin Defendants from any acts but merely declared that Plaintiffs rights were violated. The Court did not order Defendants to do anything. The Court's opinion did not "interfere" with any state court judicial process. The Court did not misinterpret the "bad faith" exception analysis in its Opinion.

D. Fed. R. Civ. P. 60(b)(1): Mistake as to Findings of Facts

Defendants claim the Court misunderstood the

state of the facts. Defendants argued that they did submit evidence in opposition to Plaintiffs claim. Defendants believed that the parties had stipulated to the facts as set forth in the "defendants' brief." Defendants claim that at the very least, the evidence submitted by the Defendants created an issue of fact that precluded summary judgment by this Court. Defendants argue that their counsel misunderstood the clarity of the record at a point in the proceedings when an answer had not yet been filed and no discovery had been conducted. Defendants now submit the affidavit of Kirsten Frank Kelly, Presiding Judge, Wayne County Circuit Court, Family Division, to support their position. Defendants further claim that the confusion in this case resulted from the loose usage of the term "Friend of the Court" throughout the record. Defendants argue that the family division referees, frequently referred to as the Friend of the Court Referees, are not part of the Friend of the Court, but are judges. Defendants claim that only after Referees have recommended bench warrants can the "digitized" signature of Judge Kelly be used. Defendants claim that the court, through procedures and guidelines, does monitor and supervise the issuance of orders to show cause and bench warrants. Defendants argue that the Circuit Court judges have the authority to delegate to their judicial referees the task of executing show cause orders and bench warrants.

In response, Plaintiff claims that the Court had asked Defendants on the record whether they

would wish to make any further written response to Plaintiffs motion for summary judgment. Defendants' counsel declined to do so. Defendants were aware of the posture of the proceedings. Plaintiff had initially requested a preliminary injunction, joined with a trial on the merits. Plaintiff agreed not to go forward with the preliminary injunction motion and trial on the merits but to proceed on his cross-motion for summary judgment. (10/5/98 hrg., pp. 4-6) Defendants did not submit any evidence rebutting Plaintiffs evidence regarding the orders to show causes and bench warrants. Plaintiff argues that Judge Kelly's proffered affidavit supports his claim that no independent judicial review is made before orders to show cause and bench warrants are issued.

Defendants' arguments that the parties had stipulated to the "facts" in Defendants' brief is not supported by the record. The Court expressly noted what would be addressed at the hearing. The Court expressly asked Defendants, "And that no one of the Defendants wishes to make any further written response to the Plaintiffs motion - Plaintiff's cross motion for summary judgment; is that right?" Defense counsel responded, "That is correct, Your Honor.' (10/5/98 hrg., p. 4) When Plaintiff argued, he expressly noted the standard for a motion for summary judgment. (105/98 hrg., pp. 11-12) Plaintiff expressly argued that the Complaint had extensive exhibits and was supplemented with a motion for summary judgment containing even more extensive affidavits, noting that most of the exhibits were

Defendants' own records. (10/5/98 hrg., p. 13) Plaintiff noted that Defendants had filed a response to the cross motion for summary judgment with no counter affidavits or exhibits attached. (10/5/98 hrg., p. 13)

Based on the record, the Court had no misunderstanding of the procedural posture of the case. The Court also expressly noted on the record, and the parties agreed, as to where the parties were at that stage of the proceedings. Defendants did not seek further discovery. Defendants were on notice that Plaintiff originally sought to have a preliminary injunction hearing, along with a trial on the merits. The record is clear that Defendants were aware that Plaintiff's cross motion for summary judgment was before the Court.

The Court had no misunderstanding as to who and what the differences are between the Friend of the Court, the Referee, and the Wayne County Circuit Court Judges. The Court found in its opinion that Plaintiff's due process rights were violated because there was no independent judicial review of the show cause orders or bench warrants. The Court's opinion expressly set forth the requirements under M.C.R. 3.208(B) and M.C.L.A. § 552.63 1(1) which the Court found were not followed by the Friend of the Court and the Wayne County Circuit Court. Defendants' arguments that the Circuit Court has the "authority" to "delegate administrative duties to a trial court administrator or others" does not change this Court's

opinion that an independent judicial review, by a Circuit Judge, is required by the Michigan statute and rule and constitutional requirements before the issuance of show cause orders and bench warrants since an individual's liberty is at stake.

As to whether the Court should consider Judge Kelly's affidavit, the Court declines to do so. It is within the discretion of the district court whether to consider untimely affidavits. *Hooks* v. *Hooks,* 771 F.2d 935. 946 (6th Cir. 1985). If the affidavit is untimely and the party does not alert the Court to any previously unconsidered issues of material fact, the affidavit should not be considered. *Michigan State Podiatry Ass 'n v. Blue Cross and Blue Shield of Michigan,* 681 F.Supp. 1239, 1241 (E.D. Mich. 1987). Fed. R. Civ. P. *56(c)* imposes a burden on the nonmoving party to produce evidence to rebut a properly supported motion for summary judgment. The nonmovant "may not rest upon the mere allegations or denials of his pleading, but his response ... must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond. summary judgment, if appropriate, shall be entered against him." *Celotex Corp. v. Cattrett,* 477 U.S. 317 (1986).

Defendants have not provided any viable reason as to why no evidence was submitted to rebut Plaintiffs motion for summary judgment. Even if the Court were to consider Judge Kelly's affidavit, a review of the affidavit shows that it raises no genuine

issue of material fact. The affidavit supports Plaintiff's claims that no Circuit judge independently reviews the orders to show cause and bench warrants prior to their issuance. Judge Kelly's affidavit indicates that only after Joseph Schewe, Director of Legal Services of FOC, an attorney and Assistant FOC, reviews the petitions is the digitized signature placed on the forms. (Kelly Aff., ¶~ 6.e., 6.m.) Mr. Schewe is not a referee nor a judicial officer. Judge Kelly's statement that effective October 18, 1999 a new procedure is in place only shows that she reviews "listings." Whether this new procedure complies with the applicable statutes and whether it violates Plaintiff's constitutional rights are not issues before the Court. The Court's Opinion noted that injunctive relief could be available to a party if a judicial officer has violated a declaratory decree. (9/29/99 Opinion, p. 16).

III. PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT

Plaintiff moves for relief from judgment under Fed.R.Civ.P. 60(b)(2) claiming that Judge Kelly's affidavit presents new evidence regarding Plaintiffs claim that the hearings before the Friend of the Court and Wayne County Circuit Courts were illegal. The Court had found that Plaintiff had not submitted sufficient evidence to support the allegations of his complaint that the hearings were illegal. Plaintiff seeks an amendment of the Declaratory Judgment as to Count VI of Plaintiff's Complaint.

Because the Court will not consider Judge Kelly's

affidavit, any new evidence in that affidavit is not before the Court. As noted above, Judge Kelly's affidavit does not change the facts which were before the Court. Plaintiff has not presented sufficient evidence regarding his claim under Count VI.

IV.PLAINTIFF'S MOTION FOR RELIEF SUPPLEMENTARY TO JUDGMENT

Plaintiff seeks to have the Court disqualify the Wayne County Circuit Court and the Friend of the Court from conducting any proceedings against or involving Plaintiff, to dissolve the *sua sponte* receivership created by the Wayne County Circuit Court, to correct the Wayne County Circuit Court and the Friend of the Court's support account, and to transfer the action to the St. Clair County Circuit Court pursuant to M.C.R. 3.21 2(B)(2)(C). Several hearings have been held before the Wayne County Circuit Court where the Court has refused to transfer the case and make any changes to Plaintiff's child support obligations. Plaintiff has also filed a bankruptcy action, which Plaintiff claims he may dismiss.

In response, Defendants claim that no actions by the Wayne County Circuit Court have been in violation of this Court's declaratory judgment. Defendants further claim that the administration of the Circuit Court's cases are not before this Court. The proper remedy for addressing any procedural issues is through the state court appellate system.

New claims brought by Plaintiff will not be addressed by the Court, including subsequent actions by the Wayne County Circuit Court. As noted by the Court in its opinion, a party may have a new cause of action for injunctive relief if he/she can show that the judicial officers have violated a federal court's declaratory judgment. Plaintiff has not presented any authority by which this Court could grant post-judgment injunctive relief. Also, the Court's judgment was declaratory and did not enjoin Defendants from any acts. The Court's Memorandum Opinion and Order and Judgment did not retain jurisdiction over enforcement of its Order. There is nothing for this Court to enforce at this time. As the Plaintiff has argued, the Court is without jurisdiction over the case, apart from the Rule 60(b) motion, since notices of appeal have been filed. The filing of a Notice of Appeal divests the district court of jurisdiction over the action and the appellate court assumes jurisdiction. *Pittock v. Otis Elevator Co.,* 8 F.3d 325 (6th Cir. 1993) Additionally, for the reasons set forth in this Court's September 30, 1999 opinion, the Court is abstaining and has abstained from any issues between the parties, other than the due process issue, on which the court has entered a judgment in favor of Plaintiff. The only matter before the Court is the Rule 60(b) motion. The Court is without jurisdiction as to any other matters because jurisdiction has been transferred to the Court of Appeals based on both parties' notices of appeal.

V. DEFENDANTS' MOTION TO STRIKE

Defendants seek an Order striking: Plaintiffs Answer to Defendants' December 23, 1999 Motion for Sanctions; Plaintiff's Request for Evidentiary Hearing; and Plaintiff's Fed. R. Civ. P. 11(c)(1)(A) Request for Award of Reasonable Expenses and Attorney Fees Incurred to Respond to and Oppose Dependants' Motion for Sanctions. After reviewing the documents, including a Motion to Disqualify, Request for Supplementary Judgment and Motion for Relief from Judgment, Defendants determined that these documents were frivolous and filed in bad faith. In accordance with Rule 11(c)(1)(A), the "safe harbor" provision, Defendants served Plaintiff with a copy of their Motion for Sanctions. Rule 11(c) states that the motion shall not be filed if not submitted to the opposing party. In direct violation of Rule 11, Plaintiff submitted a copy of Defendants' Motion for Sanctions and request for an evidentiary hearing, before Defendants filed the motion. Plaintiff then filed a response to Defendants' unfiled Motion for Sanctions. As there was no motion filed, Plaintiff should not have filed a response.

Plaintiff has not filed a response to Defendants' motion to strike. As noted above, the Court has no jurisdiction over this matter based on the notices of appeal filed by the parties. The Court cannot consider documents not related to the Rule 60(b) motions.

VI. DEFENDANTS' SUGGESTION OF MOOTNESS

AND MOTION TO VACATE THE SEPTEMBER 30, 1999 JUDGMENT AND TO DISMISS PLAINTIFF'S CLAIMS WITH PREJUDICE

Defendants claim that Plaintiffs claims are moot because he is no longer subject to the alleged procedures that he claims violate his rights to due process since the divorce action has been transferred to Macomb County Circuit Court. Defendants further claim that when a case becomes moot then the Judgment entered must be set aside. As this Court noted above, the Court no longer has jurisdiction over the Judgment, other than to rule on the Rule 60(b) motions. The Sixth Circuit's March 22, 2000 Order suggests that the Court review the mootness question based on Defendants' Motion to Vacate.

> The doctrine of mootness requires that litigation have continuing vitality, even throughout the course of appellate review. *Kremens v. Bartley,* 431 U.S. 119 (1977). Although an actual controversy once existed, changed circumstances may intervene to destroy standing to the extent that the dispute is essentially ended and meaningful relief is no longer possible. *Allen v. Mansour,* 928 F.2d 404 (Table), 1991 WL 37832 ** 1 (6th Cir. Mach 19, 1991)(unpublished). Mootness applies where a plaintiff seeks a declaratory judgment invalidating or modifying a state policy and death prevents a plaintiff from benefiting in any way from the requested relief. *Id.* An exception to the mootness doctrine is whether the issue raised by the appeal is "capable of repetition, yet

evading review." *Id.* at **2; *See Southern Pacific Terminal Co. v. I.C.C.,* 219 U.S 498 (191 1); *Roe v. Wade,* 410 U.S. 113, 166 (1973). The party seeking to evade mootness must show that: 1) the challenged official action is likely to be repeated; 2) it will be of a duration too short to be fully litigated prior to its cessation or expiration; and 3) there is "a reasonable expectation that the same complaining party [will] be subjected to the same action again. *Weinstein v. Bradford,* 423 US 147,159 (1975).

On of the challenged official actions is whether show cause orders and bench warrants are reviewed independently by a judicial officer. Based on the record below, it appears that the challenged official actions may likely be repeated. According to Judge Kelly's affidavit1 the procedure prior to October 18, 1999 was that only after Joseph Schewe, Director of Legal Services of FOC, an attorney and Assistant FOC, reviewed the petitions was her digitized signature placed on the forms. (Kelly Aff. @@6.e, 6m). Mr. Schewe is not a referee nor a judicial officer. Judge Kelly's statement that effective October 18, 1999 a new procedure is in place only shows that she reviews "listings", the constitutionality of which is not before this Court.

As to the second requirement for mootness, based on the record before the Court, there has been a showing that based on Judge Kelley's

---

1 The Court considers Judge Kelly's affidavit on the mootness issue.

affidavit and the change in procedure, the duration of the challenged action regarding the judicial review of show cause orders and bench warrants may have ceased prior to the matter being fully litigated. However, there are other actions challenged by Plaintiff which may endure too briefly to be fully litigated prior to its cessation or expiration. Plaintiff has suggested that the order transferring his divorce action to Macomb County Circuit Court was issued to support Defendants' mootness argument and to evade review. This argument may have had some merit if the order transferring the divorce action was entered sua sponte but the order was entered after Judge Callahan granted Plaintiff's motion to disqualify the Wayne County Circuit Court bench. (Ex. B to Plaintiff's Response, 12/10/99 Tr. Pp 14-15).

Regarding the third argument to establish mootness, Plaintiff is unable to show that as the complaining party he will be subjected to the same action again by the Defendants in this case. Plaintiff's divorce proceeding is no longer before the Wayne County Circuit Court.

There is no dispute that Plaintiff moved to disqualify the entire Wayne County Circuit Court bench to review his divorce action and that an order was entered transferring the case to the Macomb County Circuit Court. Plaintiff claims that the order entered transferring the case to the Macomb County Circuit Court was used to support Defendants' argument as to mootness.

Plaintiff claims that the procedures set forth by the State Court Administrator's Office were not followed. Plaintiff argues that the SCAO should have chosen the transferee County yet in the order transferring Plaintiff's divorce action, Judge J. William Callahan himself ordered the transfer to the Macomb County Circuit Court. For the reasons set forth previously, the Court will not review whether the order transferring the divorce action was entered properly since that claim is not before the Court.

Plaintiff further argues that he would face the same issues before the Macomb County Circuit Court. If Plaintiff were to be subjected to the same issues as he did in the instant case, those claims would be against different defendants than those named in the instant case. There is nothing before the Court to show that the Macomb County Circuit Court uses the same procedures for reviewing orders to show cause and bench warrants.

The Court finds that there is no longer a present, live controversy between the parties because the issues have been rendered moot by the transfer of Plaintiff's divorce action to the Macomb County Circuit Court. The Sixth Circuit will not be able to render a decision which would have an impact upon Plaintiff and the circumstances of the pending appeal do not fall within any well recognized exception to the mootness doctrine. The Court certifies to the

Sixth Circuit Court of Appeals that this Court is of the opinion that an order vacating the Judgment and dismissal should issue and requests a remand of the matter if the Court of Appeals so deems appropriate.

VII CONCLUSION

For the reasons set forth above.

IT IS ORDERED that Defendants' Motion for Relief from Judgment (Docket No.49, filed November 1, 1999) is DENIED.

IT IS FURTHER ORDERED that Plaintiff's Motion for Relief from Judgment (Docket No. 74, filed November 29, 1999) is DENIED.

IT IS FURTHER ORDERED that Plaintiff's Motion for Relief Supplementary to Judgment (Dockets No. 71, filed November 19, 1999) is DENIED.

IT IS FURTHER ORDERED that Defendants' Motion to Strike documents in response to Defendants' unfiled Motion for Sanctions (Docket No. 89, filed January 18, 2000) is GRANTED.

IT IS FURTHER ORDERED that Defendants' Motion for Suggestion of Mootness and Motion to Vacate the Judgment and Motion to Dismiss Plaintiff's Claims with Prejudice (Docket Nos. 92-1 and 92-2, filed February, 2000) is GRANTED

pending the Sixth Circuit's order remanding the matter for entry of an order setting aside the Judgment and an order of dismissal of the case. The Court CERTIFIES to the Sixth Circuit Court of Appeals that this Court is of the opinion that an order setting aside the Judgment and an order of dismissal should issue and requests a remand of the matter if the Sixth Circuit so deems appropriate.

_"s/_____
DENISE PAGE HOOD
United States District Judge

Dated: September 28, 2001

Appendix E

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

Grace E. Tindall,

Case No.: 90-026438

Plaintiff,

V

Michael E. Tindall,

Defendant.
_____/

ORDER TRANSFERING CASE TO MACOMB COUNTY

This matter having come before this Court on Defendant's Notice/Motion for Entry of Order Dissolving Receivership and to Set Aside Order for Medical Expense Reimbursement and Sanctions Dated October 18, 1999, Defendant's Motion to Reverse Unauthorized Adjustment to Child Support Account and to Enforce Order Crediting Child Support Account dated October 18, 1999; Defendant's Verified Motion to Disqualify Wayne County Circuit Court Bench on Due Process Grounds and to Reassign Matter under MCR 3.212 dated November 9, 1999; and Receiver's Petition for Payment of Interim Fiduciary and Attorney Fees and

For Entry of Amended Order Appointing Receiver dated December 1, 1999, and, Plaintiff having appeared *in pro per,* and the office the Friend of the Court having been represented by Mr. Alan E. Skrok,

This Court having conducted a hearing on December 10, 1999, and it appearing to this court that in Michael E. Tindall vs. Wayne County Friend of the Court, By Joseph A. Schewe, Director of Legal Services, and Alan E. Skrok, Staff Attorney and Assistant Friend of the Court; Wayne County Sheriff's Department, By Robert Ficano, Sheriff: [and] Wayne County Circuit Court, Family Division, by Kirsten Frank Kelly, Presiding Judge and Michael F. Sapala, Chief Judge, J/S Case No 98-CV-73896-DT 9, pending in the Federal District Court for the Eastern District of Michigan (hereinafter "Tindall v. FOC") an opinion has been rendered in favor of the Defendant herein determining that the "Friend of the Court's practice to issue show cause orders and bench warrants without actual review by a judge and Defendant's [apparently all defendants, including this court] failure to follow the procedures set forth in MCR 3.208(B) and MCL 552.631 violate Plaintiff's due process rights" and a Judgment was entered thereon against Defendants in Tindall v. FOC, (including, apparently, this court).

It appearing to this Court that there is now an issue of the mere appearance of impartiality which

may tend to erode the public's confidence in the integrity of the judiciary based on the adverse ruling in Tindall v. FOC, indicates that this court should transfer this case to another county (See Michigan Code of Judicial Conduct, Cannon 2 A and B (discussing the importance of the public's confidence in the impartiality and integrity of the judiciary)), and

Defendant having submitted an order for entry pursuant to MCR 2,602(B)(3) and no written objections to the proposed order having been filed, and this court, sua sponte, having determined that changes to Defendant's proposed order are necessary to comport with this court's decision as well as to conform to the practices of the State Court Administrator's Office, and

After having conferred with members of the State Court Administrator's Office, and on January 13, 2000, this court having spoken with Judge Donald Martin of the Macomb County Circuit Court Family Division concerning the intention of this court to transfer this matter to Macomb County Circuit Court and this court being otherwise fully advised in the premises;

NOW THEREFORE, IT IS HEREBY ORDERED THAT:

1. Defendant's Notice/Motion for Entry of Order Dissolving Receivership and to Set Aside Order for Medical Expense

Reimbursement and Sanctions Dated October 18, 1999, Defendant's Motion to Reverse Unauthorized Adjustment to Child Support Account and to Enforce Order Crediting Child Support Account dated October 18, 1999; and Receiver's Petition for Payment of Interim Fiduciary and Attorney Fees and For Entry of Amended Order Appointing Receiver dated December 1, 1999, be, and they are hereby adjourned to be heard following reassignment of this case.

2. Defendant's Verified Motion to Disqualify Wayne County Circuit Court Bench on Due Process Grounds and to Reassign Matter to St. Clair County under MCR 3.212 dated November 9, 1999, is denied because the conditions under subrule (B) of MCR 3.212 are not satisfied.

3. This matter is hereby transferred to Macomb County Circuit Court in accord with MCR 2.212(A)(1)and (B)(2).

4. Defendant, Michael E. Tindall, shall pay any past-due fees and costs to the Wayne County Friend of the Court at the time of transfer pursuant to MCR 2.21 2©(2).

5. Defendant, Michael E. Tindall, shall pay any

and all costs incurred as a result of the transfer pursuant to MCR 2.212©(3).

6. Defendant shall continue to remit child support payments to the Wayne County Friend of the Court until this case is transferred to and established in Macomb County.

Dated January 14, 2000

__"s_____
J. W. CALLAHAN

TRUE COPY

Appendix F

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

Grace E. Tindall

Case No.: 90-026438 DM

Plaintiff,

v.

Michael E. Tindall,

Defendant.

_____/

ORDER TRANSFERING CASE TO MACOMB COUNTY

This matter is now before the Chief Judge of this Circuit Court upon its return from Macomb County Circuit Court, to which the matter had been transferred. The factual background is as follows:

Defendant previously petitioned the Trial Court (per the Honorable John William Callahan) to transfer this action to St. Clair County under MCR 3.212 citing "due process grounds." By Order of January 14, 2000, the Trial Court denied

that motion, finding that these grounds did not satisfy the conditions for transfer stated in MCR 3.212(B)(1). Nevertheless, the Trial Court found that there was an appearance of impropriety and partiality that might tend to erode the public's confidence in the integrity of the judiciary based upon the adverse ruling in Tindall v FOC. Accordingly, the Trial Court concluded that the matter should be transferred to another court. The Trial Court conferred with members of the State Court Administrator's Office and, pursuant to that conference, ordered the matter transferred to Macomb County Circuit Court in accord with MCR 3.212(A)(1) and (B)(2). The Trial Court also directed defendant to pay any and all costs incurred as a result of the transfer pursuant to MCR 3.212(C)(3). Defendant failed and refused to pay those costs, despite having requested the transfer. Accordingly, the Macomb County Circuit Court issued an Order of Dismissal on March 17, 2000, and returned this matter to this Court.

The Court's concerns regarding the appearance of impropriety and partiality still being an issue of paramount importance, IT IS HEREBY ORDERED THAT

1. This Matter is hereby transferred to Macomb County Circuit Court in accord with MCR 3.212(A)(1) and (B)(2) and pursuant to the Court's conference with the State Court Administrator's Office.

2.Pursuant to MCR 3.212(D), no statutory filing fee shall be assessed as this Court has initiated the transfer.

Dated March 28, 2000.

_"s_____
HON. MICHAEL F. SAPALA
Chief Judge, Third Judicial Circuit Court

A TRUE COPY

(3)

Supreme Court, U.S.
FILED

011168 JAN 12 2002

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

MICHAEL E. TINDALL
Plaintiff-Petitioner
v.

WAYNE COUNTY FRIEND OF THE COURT, BY JOSEPH A. SCHEWE, Director of Legal Services; ALAN E. SKROK, Staff Attorney, Assistant Friend Of Court; WAYNE COUNTY SHERIFF'S DEPARTMENT, By: ROBERT FICANO, Sheriff; WAYNE COUNTY CIRCUIT COURT, FAMILY DIVISION, By: KIRSTEN FRANK KELLY, Presiding Judge; MICHAEL F.SAPALA, Chief Judge
Defendants-Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

APPENDIX II TO PETITION FOR A WRIT OF CERTIORARI

Michael E. Tindall
TINDALL & CO. P.C.
49 Macomb PL
Suite 29
Mt. Clemens MI 48043
(313) 640-4450

Counsel for the Petitioner

77 pp

Appendix G

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

MICHAEL E. TINDALL, individually and on behalf of all others similarly situated

Plaintiff

VS

CASE NO. _____
HON. _____

THE STATE OF MICHIGAN;
MICHIGAN STATE FRIEND OF COURT BUREAU ("FOCB");
WAYNE COUNTY CIRCUIT COURT, FAMILY DIVISION ("WCCC"),
BY: HON. KIRSTEN FRANK KELLY, PRESIDING JUDGE;
WAYNE COUNTY FRIEND OF COURT ("WFOC"),
BY: KIM S. BATEMAN;
OAKLAND COUNTY CIRCUIT COURT, FAMILY DIVISION ("OCCC"),
BY: HON. JOAN E YOUNG, PRESIDING JUDGE;
OAKLAND COUNTY FRIEND OF COURT ("OFOC"),

BY: JOSEPH G. SALAMONE;

MACOMB COUNTY CIRCUIT COURT, FAMILY DIVISION,
BY: HON. DONALD MILLER, PRESIDING JUDGE;
MACOMB COUNTY FRIEND OF COURT (MFOC"),
BY: THOMAS J. MCDONALD;
MONROE COUNTY CIRCUIT COURT, FAMILY DIVISION, ("MOCCC")
BY: HON. JOHN HALLMAN, PRESIDING JUDGE;
MONROE COUNTY FRIEND OF COURT ("MOFOC"),
BY: MARIA ZAGORSKI;
WASHTENAW COUNTY CIRCUIT COURT, FAMILY DIVISION ("WACCC")
BY: HON. JOHN HIRKENDALL, PRESIDING JUDGE;
WASHTENAW COUNTY FRIEND OF COURT ("WAFOC"),
BY: LINDA EDWARDS - BROWN;
LIVINGSTON COUNTY CIRCUIT COURT, FAMILY DIVISION ("LCCC"),
BY: HON. SUSAN RECK , PRESIDING JUDGE;
LIVINGSTON CONTY FRIEND OF COURT ("LCFOC");
BY: MELISSA SCHARRER;
GENESEE COUNTY CIRCUIT COURT, FAMILY DIVISION ("GCCC"),
BY: HON. DUNCAN BEAGLE, PRESIDING JUDGE;
GENESEE COUNTY FRIEND OF COURT ("GFOC")

BY: JENNIE BARKLEY;

DAVIND M. FINDLING, ESQ., a/k/a "GARBAGE MAN" ("DMF") AND
FINDLING LAW FIRM PLC, ("FLF") jointly and severally,

Defendants.
_____\

TROMBLY TINDALL P.C.
ATTORNEYS FOR PLAINTIFF
BY: MICHAEL E. TINDALL (P29090)
600 HURON AVE., STE. 14
PORT HURON, MI 48060
(810)-385-7344
FAX: (815) 425-0657

_____\

CLASS ACTION COMPLAINT FOR VIOLATION OF U.S. AND MICHIGAN CONSTITUTIONS, DECLARATORY JUDGMENT AND OTHER EQUITABLE RELIEF.

COMPLAINT AND JURY DEMAND

Now comes Plaintiff, by and through his undersigned attorneys, TROMBLY TINDALL P.C.,

and for this Complaint states as follows:

NATURE OF THE CASE:

1.This is a class action on behalf of all payers of child support in the seven (7) county metropolitan Detroit area and throughout the State of Michigan subject to domestic relations support orders and/or enforcement proceedings from and after August 22, 1996.

2. Plaintiff class members seek a declaration of their rights under the U.S. and Michigan Constitutions, Michigan statutes, and, Michigan court rules, together with equitable relief including an injunction(s) against further and additional violations of their constitutional and statutory rights; dissolution of illegal and unconstitutionally created receiverships and seizures of personal and real property; rescission of illegal and unconstitutional suspensions of professional, occupational, drivers and other licenses; restitution of illegally and unconstitutionally seized and taken real and personal property; accounting for and restitution of all proceeds of the sale or liquidation of illegally seized real and personal property and of all illegal, excessive and unreasonable fees, costs, and, expenses imposed on Plaintiff class members and paid to illegally and unconstitutionally appointed post judgment, state court domestic relations

receivers as a consequence of the violation of their constitutional and statutory rights.

3. On or about August 22, 1996, the U.S. Congress enacted P.L. 104-193, amending Section 466 of the Social Security Act, being 42 USC 666, to require states, including Michigan, to enact statutory procedures to improve the effectiveness of state child support enforcement under penalty of reduction of federal revenue sharing. These federally imposed requirements included the mandatory establishment of:

   A. Procedures under which liens would arise by operation of law against real and personal property of child support payers for amounts of overdue support allegedly owed by non custodial parents who reside or own property in the State of Michigan. 42 USC 666(a)(4)

   B. Procedures requiring a non custodial parent to give security, post bond, or, give some other guarantee to secure payment of

overdue support; *after* notice to the non custodial parent of the proposed action; *after* notice of the procedures to be followed to contest the alleged arrearage; and, *after* full compliance with all procedural due process requirements of the State of Michigan. 42 USC 666(a)(6).

C. Procedures under which the State of Michigan is to withhold, suspend or restrict the use of drivers, professional, occupational, recreation, and, sporting licenses of individuals allegedly owing overdue support, or, failing, *after appropriate notice*, to comply with subpoenas or warrants relating to paternity or child support proceedings. 42 USC 666(a)(16).

4.Thereafter, in an attempt to enact statutory provisions to comply with these federal requirements and to avoid loss of federal revenue sharing funds and revenue, the Michigan legislature enacted:

A. PA 1996, No. 239, being MCLA 552.628, effective January 1, 1997, authorizing an "office of friend of court" to petition a circuit

court to suspend professional, occupational, drivers and other licenses of a support payer three (3) months or more in arrears under a support order.

B.. PA 1998, No. 334, being MCLA 552.625b, effective August 10, 1998, authorizing an "office of friend of court" to perfect a lien against, encumber, seize, and, sell real and personal property, including through the appointment of a post judgment domestic relations receiver, of a payer of support if an arrearage accrues in an amount exceeding one (1) years support payments payable under a payer's support order.

5. PA 1996, No. 239, is unconstitutional on its face as it violates the Separation of Powers Clause, Article III, Section 2, of the Michigan Constitution; the Administrative action clause, Article VI, Section 28, of the Michigan Constitution; the due process clause, Article I, Section 17, of the Michigan Constitution; the Michigan Administrative Procedures Act, being MCLA 24.201, et seq.; and, thereby, deprives support payers in Michigan of their federally protected, constitutionally guaranteed right to due process of law under the 5th and 14th Amendments to the U.S. Constitution.

6.PA 1998, No. 334, is unconstitutional on its face as it violates the due process clause, Article I, Section 17 of the Michigan Constitution; and, deprives support payers in Michigan of their federally protected, constitutionally guaranteed right to due process of law under the 5th and 14th Amendments to the U.S. Constitution.

7.Throughout the Class Period, Defendants have, nevertheless, illegally and unconstitutionally suspended licenses of support payers, and, perfected liens and encumbrances against, and, seized, taken and sold real and personal property of support payers in the seven (7) county metropolitan area and throughout the State of Michigan, with and without the appointment of post judgment state court receivers, in violation of both the U.S. and Michigan Constitutions, without due process of law, and, in violation of the very statutory conditions imposed upon them by PA 1996, No 239, and, PA 1998, No. 334.

8.Defendants State of Michigan and FOCB have failed to adequately train and supervise Defendants "offices of friend of court"; have failed to adequately train, supervise and administer Defendants circuit courts; and, have failed to proscribe and implement adequate policies and procedures to ensure that the constitutional rights of support payers in the

seven (7) county metropolitan area and throughout the State of Michigan are adequately protected and enforced.

9.Throughout the Class Period, Defendants circuit courts and "offices of friend of court" have engaged in excessive and illegal appointments of post judgment domestic relations receivers, as a child support collection and enforcement device, without proper notice or hearing and in violation of the statutory conditions and restrictions contained in PA 1998, No. 334.

10.Although various persons have received appointments to act as post judgment domestic relations receivers, the disproportionate majority of said appointments in the seven (7) county metropolitan area have been given to David M. Findling, ("DMF"), a/k/a/ the "Garbage Man" and his law firm FINDLING LAW FIRM PLC ("FLF").

11.Under the authority and with the approval of Defendants circuit courts and Defendants "offices of friend of court", DMF and FLF have illegally and unconstitutionally encumbered, seized and taken the real and personal property of support payers under color of state law without due process of law and without just compensation; have liquidated and sold such

property for inadequate and less than full value; have failed to properly account for and apply proceeds from such sale and liquidation of property in accordance with state law; have charged and paid themselves, from the proceeds of such sales, excessive, unreasonable and unnecessary fees and compensation; and, have failed to properly pay over, credit and apply the proceeds of such seizures and sales against the support arrearages of targeted support payers.

12.Defendants circuit courts and "offices of friend of court" permit and encourage the illegal and unconstitutional appointments of DMF and FLF as post judgment domestic relations receivers pursuant to Orders of Appointment drafted by DMF and FLF, which Orders purport to illegally cloak DMF and FLF with absolute judicial immunity for their illegal acts; permit and approve the illegal and unconstitutional seizure and taking of private property in violation of law; and, authorize and approve the charging, payment and illegal application of excessive and unreasonable fees and costs to and by DMF and FLF; all as a device to illegally and improperly increase both the volume and amount of enforcement actions and collections against child support payers in Michigan, and, thereby, preserve and maintain Defendants' eligibility for and avoid reductions in federal funding and revenue sharing.

13.Defendants circuit courts and "offices of friend of courts" fail to terminate and dissolve these illegal and unconstitutional post judgment domestic relations receiverships when otherwise required pursuant to statute, thereby illegally preserving, continuing and maintaining such receiverships as ongoing collection and enforcement devices which can and are re-activated at will and without complying with required notice, hearing and due process requirements for the collection of future support arrearages.

14.Due to Defendants' illegal and unconstitutional conduct, and, their blatant violation of and disregard for statutory and rule made requirements for notice, hearing, and, required due process, Plaintiff and the other class members have had their property illegally encumbered, seized, sold, and, liquidated without due process of law; have had or been threatened with the illegal and unconstitutional suspension of licenses and the consequent limitation on their right and ability to earn an income; have had property taken without just compensation; have had property liquidated and sold at inadequate and less than fair value; have been subjected to and charged with excessive, unreasonable and unnecessary costs, fees, and expense; and, remain subject to the ongoing illegal and

unconstitutional control of these illegally appointed domestic relations receivers.

COUNT I: ALL DEFENDANTS

JURISDICTION

15. At all times relevant to the allegations of this Complaint, Plaintiff was a party to post Judgment domestic relations proceedings in Michigan, is subject to the Michigan Friend of Court Act (Act), MCLA 552.501, et seq., and the Support and Visitation Enforcement Act (Enforcement Act), being MCLA 552.601, and, is the holder of both operator and professional/occupational licenses in the State of Michigan.

16. Defendant State of Michigan operates, maintains and is responsible for the activities of Defendant Wayne County Friend of Court pursuant to MCLA 552.527; and, supervises, directs and is responsible for the training and activities of the remaining Defendant Friend of Court offices through its agency, Defendant State Friend of Court Bureau, pursuant to MCLA 552.519

17.Defendant State Friend of Court Bureau (FOCB) is a bureau or division of the Office of the

State Court Administrator created pursuant to Section 19 of the Friend of Court Act, being MCLA 552.503 and 552.519, and, is an agency of the State of Michigan statutorily charged with the duties and responsibilities of:

(a) developing and recommending guidelines for the conduct, operations, and, procedures employed by the Defendant "friend of court offices" in the course of:

(i)investigative functions
(ii)recommendation functions

(iii)referee functions; and,

(iv)enforcement functions

(b) training Defendant county "friend of court offices" and their employees to carry out statutory investigative, recommendation, referee and enforcement duties.

(C.) Developing guidelines for:

A. the imposition of liens against real and personal property of child support payers in Michigan, including, but not limited to, the appointment of

post judgment domestic relations receivers and the seizure of real and personal property belonging to such child support payers for the purpose of payment of allegedly past due child support arrearages.

B. requiring the posting of bond by child support payers in Michigan; and,

C. requiring security or other guarantees to secure the payment of support by child support payers in Michigan, including but not limited to, the suspension of professional/occupational and other licenses held by payers of child support; the appointment of post judgment domestic relations receivers, and, the seizure of real and personal property belonging to such child support payers in Michigan for the purpose of payment of allegedly past due child support arrearages.

18. Defendant Wayne County Circuit Court, Family Division, (WCCC) is the family division of

the Wayne County Circuit Court having sole and exclusive jurisdiction over the issuance and enforcement of support orders for Wayne County. Hon. Kristen Frank Kelly is presiding judge of the Family Division.

19. Defendant Wayne County Friend of Court (WFOC), is operated and maintained by the State of Michigan, and, is an "office of the friend of the court" created pursuant to Section 3 of the Michigan Friend of the Court Act, being MCLA 552.502, empowered by Michigan statute and Court Rule with responsibility for initiating proceedings to enforce orders and judgments issued by the Wayne County Circuit Court for support, visitation and custody. Kim S. Bateman is the Wayne County Friend of Court.

20.Defendant Oakland County Circuit Court, Family Division, (OCCC) is the family division of the Oakland County Circuit Court having sole and exclusive jurisdiction over the issuance and enforcement of support orders for Oakland County. Hon. Joan Young is presiding judge of the Family Division.

21. Defendant Oakland County Friend of Court (OFOC), is operated and maintained by the County of Oakland, and, is an "office of the friend of the court" created pursuant to Section 3 of the

Michigan Friend of Court Act, being MCLA 552.502, empowered by Michigan statute and Court Rule with responsibility for initiating proceedings to enforce orders and judgments issued by the Oakland County Circuit Court for support, visitation and custody. Joseph G. Salamone is the Oakland County Friend of Court.

22.Defendant Macomb County Circuit Court, Family Division, (MCCC) is the family division of the Macomb County Circuit Court having sole and exclusive jurisdiction over the issuance and enforcement of support orders for Macomb County. Hon. Donald Miller is presiding judge of the Family Division.

23. Defendant Macomb County Friend of Court (MFOC), is operated and maintained by the County of Macomb, is an "office of the friend of the court" created pursuant to Section 3 of the Michigan Friend of Court Act, being MCLA 552.502, empowered by Michigan statute and Court Rule with responsibility for initiating proceedings to enforce orders and judgments issued by the Macomb County Circuit Court for support, visitation and custody. Thomas J. McDonald is the Macomb County Friend of Court.

24. Defendant Monroe County Circuit Court, Family Division, (MOCCC) is the family

division of the Monroe County Circuit Court having sole and exclusive jurisdiction over the issuance and enforcement of support orders for Monroe County. Hon. John Hollman is presiding judge of the Family Division.

25. Defendant Monroe County Friend of Court (MOFOC), is operated and maintained by the County of Monroe, and is an "office of the friend of the court" created pursuant to Section 3 of the Michigan Friend of Court Act, being MCLA 552.502, empowered by Michigan statute and Court Rule with responsibility for initiating proceedings to enforce orders and judgments issued by the Monroe County Circuit Court for support, visitation and custody. Maria Zagorski is the Monroe County Friend of Court.

26. Defendant Washtenaw County Circuit Court, Family Division, (WACCC) is the family division of the Washtenaw County Circuit Court having sole and exclusive jurisdiction over the issuance and enforcement of support orders for Washtenaw County. Hon. John Hirkendale is presiding judge of the Family Division.

27. Defendant Washtenaw County Friend of Court (WAFOC), is operated and maintained by the County of Washtenaw, and is an "office of the friend of the court" created pursuant to

28. Section 3 of the Michigan Friend of Court Act,being MCLA 552.502, empowered by Michigan statute and Court Rule with responsibility for initiating proceedings to enforce orders and judgments issued by the Washtenaw County Circuit Court for support, visitation and custody. Linda Edwards-Brown is the Washtenaw County Friend of Court.

28. Defendant Livingston County Circuit Court, Family Division, (LCCC) is the family division of the Livingston County Circuit Court having sole and exclusive jurisdiction over the issuance and enforcement of support orders for Livingston County. Hon. Susan Reckk is presiding judge of the Family Division.

29. Defendant Livingston County Friend of Court (FOC), is operated and maintained by the County of Livingston, is an "office of the friend of the court" created pursuant to Section 3 of the Michigan Friend of Court Act, being MCLA 552.502, empowered by Michigan statute and Court Rule with responsibility for initiating proceedings

to enforce orders and judgments issued by the Livingston County Circuit Court for support, visitation and custody. Melissa Scharrer is the Lingston County Friend of Court.

30. Defendant Genesee County Circuit Court, Family Division, (GCCC) is the family division of the Genesee County Circuit Court having sole and exclusive jurisdiction over the issuance and enforcement of support orders for Genesee County. Hon. Duncan Beagle is presiding judge of the Family Division.

31. Defendant Genesee County Friend of Court (GFOC), is operated and maintained by the County of Genesee, is an "office of the friend of court" created pursuant to Section 3 of the Michigan Friend of Court Act, being MCLA 552.502, empowered by Michigan statute and Court Rule with responsibility for initiating proceedings to enforce orders and judgments issued by the Genesee County Circuit Court for support, visitation and custody. Jennie Barkey is the Genesee County Friend of Court.

32. DAVID M. FINDLING, ESQ., a/k/a the *"GARBAGE MAN"* ("DMF") is an attorney licensed to practice law in the State of Michigan and is a

principal/shareholder of FINDLING LAW FIRM PLC.

33. FINDLING LAW FIRM P.L.C. ("FLF") is the employer and principle of DMF and in whose name and under whose direction the illegal acts and scheme complained of herein were carried out. Upon information and belief, FLF and DMF are the principal architects and/or primary facilitators of a new illegal and unconstitutional policy, practice and procedure implemented by Defendants to use state court appointed receiverships as a post Judgment child support enforcement device; to illegally take private property without due process of law or just compensation in violation of the 5th and 14th Amendments to the U.S. Constitution, Article I, Section 17 of the Michigan Constitution, and, in violation of applicable state statutes and court rules; to illegally profit thereby through large volumes of illegal and improper court appointments obtained from Defendants, the charging of excessive and illegal fees, and, the failure to properly pay and account for moneys and funds illegally obtained from the sale/liquidation of illegally seized property, and, the failure to properly credit/apply such moneys and funds in accordance with statutorily proscribed priorities; all in exchange for assisting and facilitating the illegal acts and activities of Defendants complained of herein for the purpose

of preserving Defendants' share of federal revenue sharing monies.

COUNT II: ALL DEFENDANTS

GENERAL ALLEGATIONS

34. Plaintiff incorporates by reference the allegations contained in paragraphs 1-33 above.

35. At all times relevant hereto, Plaintiff has been an attorney licensed to practice law by the Michigan Supreme Court and the holder of various and sundry drivers and other licenses issued by the State of Michigan and/or its political subdivisions.

36.On or about December, 1991, Plaintiff was divorced by a Judgment of the WCCC.

37. From approximately 1992 through the current date, Plaintiff has been subject to the provisions of the Act and Enforcement Act as a payer of support for minor children pursuant to the judgment and orders of the WCCC.

38.From 1992 through the current date, Plaintiff has been the target of approximately eight (8) enforcement proceedings initiated by Defendant WCFOC before Defendant WCCC

relating to alleged support arrearages and commenced by the issuance of illegal and unconstitutional show cause orders ("SCOs") and/or illegal and unconstitutional bench warrants ("BWs") issued by Defendant WCFOC under the authority of and in complicity with Defendant WCCC.

39. Upon information and belief, the remaining Defendants "offices of friend of court" and Defendants circuit courts follow the same practices and procedures employed by Defendants WCCC and WCFOC for initiating and conducting support enforcement.

40. Upon information and belief, Defendant FOCB, acting in the name and under the authority of Defendant State of Michigan, designs, proscribes and approves the illegal and unconstitutional procedures and practices used by Defendants "offices of friend of courts" and Defendants circuit courts for the enforcement of child support orders.

41. On or about August 24, 1998, Defendant WCFOC issued the letter attached hereto as Exhibit A initiating a hearing before Defendant WCCC to suspend Plaintiff's license to practice law in Michigan based upon an alleged child support arrearage.

42. In August, 1998, Plaintiff discovered

that his child support account/balance had been illegally and improperly increased by Defendant WCFOC on March 13, 1998, by a computerized memo entry in the amount of $ 2,774.28, See, Exhibit B, for which no order had ever been entered by Defendant WCCC and while a properly filed Objection and Demand for De Novo Judicial hearing had been properly filed with Defendant WCCC and properly served on Defendant WCFOC. See, Exhibits C and D.

43. On or about September 4, 1998, Plaintiff filed an action in the United States District Court, Eastern District of Michigan, Case No. 98-CV-73896-DT (Federal Case) against Defendants WCCC and WCFOC under 28 USC 1983 for violation of Plaintiff's federally protected, constitutionally guaranteed rights to due process of law based upon the issuance of illegal and unconstitutional SCOs and BWs and the failure and refusal of Defendants WCCC and WCFOC to follow and obey Michigan statutes and court rules governing notice, hearing and de novo judicial hearing in the course of child support enforcement proceedings.

44. On or about February 2, 1999, while the Federal Case was pending decision, Defendants WCFOC and WCCC issued yet another illegal and unconstitutional SCO and BW for an alleged child support arrearage which they

knew was incorrect and inaccurate and which they knew included the amount of the illegal adjustment made to Plaintiff's account by Defendant WCFOC without proper court order.

45.Defendants WCCC and WCFOC knew, or, had reason to know that:

A. the SCO recited a knowingly false and incorrect arrearage balance

B. the incorrect arrearage balance resulted from the illegal action of Defendant WCFOC in adjusting Plaintiff's account.

C. The SCO was not properly supported by a sworn Affidavit as required by applicable law and court rule.

D. The SCO was not properly issued or signed by an independent judicial officer as required by law; but, was, in fact, issued by Defendant WCFOC.

E. The SCO was null and void and of no effect whatsoever; and, therefore, ineffectual to require or command an appearance or response The SCO was legally in

inadequate and insufficient to initiate proceedings or to create jurisdiction to take or conduct any valid action or proceeding against Plaintiff.

46. On or about February 25, 1999, Defendant WCFOC did unlawfully conduct a show cause hearing pursuant to the illegal and invalid SCO at which Plaintiff did not appear.

47. Thereafter, on February 25, 1999, Defendant WCCC, the Hon. J.W. Callahan presiding, without notice, hearing, or even conducting a proceeding on the record, did suae sponte appoint DMF and FLF as a post judgment domestic relations receiver over Plaintiff by telephone call.

48. On February 25, 1999, at the time Defendant WCCC appointed DMF and FLF as post judgment domestic relations receiver over Plaintiff:

    a. The "alleged" arrearage claimed by Defendant WCFOC did not exceed one (1) years support payments due under Plaintiff's support order;

    b. The "alleged" arrearage was known by Defendant WCFOC to be inaccurate and overstated by the

illegal computer entry made by Defendant WCFOC.

c. Plaintiff either had no true arrearage, or, the true arrearage was substantially less than the amount alleged by Defendant WCFOC.

d. Neither Defendant WCFOC, Defendant WCCC, nor, Defendant DWF ever complied with the statutory notice, hearing, and, other conditions, requirements and restrictions imposed by MCLA 552.625b as a necessary and essential predicate to the imposition of liens and encumbrances against real and personal property; the seizure of real or personal property; or, the appointment of a post judgment domestic relations receiver.

49. Thereafter, Defendant DWF and FLF did present for entry by Defendant WCCC an order which, upon information and belief, is their standard form post judgment domestic relations receivership Order used in Defendant

circuit courts, appointing DMF and FLF as post judgment domestic relations receiver over Plaintiff, See, Exhibit E, which Order contained numerous violations of applicable federal and Michigan law, including:

a. authorizing seizure and sale of real and personal property to satisfy "future" support, medical and insurance in direct violation of MCLA 552.603(2) which expressly provides that support amounts become an enforceable judgment only on or after the date each payment is due.

b. Authorizing and directing said receivership to extend beyond the real and personal property of Plaintiff to include property, entities, and, interests belonging to others. Authorizing the entry upon and seizure of private property, both that owned by Plaintiff and that owned by others, without warrant and by breaking, entering and use of FORCE and disturbance of the peace.

c.Authorizing the execution of legal documents and the initiation, participation and termination of

legal proceedings in Plaintiff's name

d. Authorizing DMF and FLF to charge receiver fees, expenses and costs to Plaintiff rather than against the person seeking or benefiting from the actions of the receiver, in violation of MCR 6.222.

e. Authorizing DMF and FLF to initiate and carry out legal action and proceedings ; and, thereby, generate additional excessive legal fees and costs without requiring either approval of the court or compliance with MCR 6.222.

f. Authorizing/granting DMF and FLF priority over other claimants and creditors, including the statutory priority for support, in violation of MCLA 552.603, 552.625a and 552.625b.

g. Granting DMF and FLF absolute judicial immunity despite the absence of any provisions of law authorizing same.

c. Upon information and belief, it is the common and established practice and procedure of Defendants WCCC and WCFOC, and, the remaining Defendants "offices of friend of court" and circuit courts to suspend licenses, and, appoint and employ post judgment domestic relations receivers in the same or similar manner and using the same illegal and unconstitutional practices and procedures in violation of MCLA 552.625b.

51. Upon information and belief, the practices and procedures used by Defendants WCFOC and WCCC for the suspension of licenses, and, the appointment and employment of post judgment domestic relations receivers, and/or the seizure of real and personal property of support payers, is known to, authorized and approved by Defendant FOCB in the name and under the authority of Defendant State of Michigan.

52. Upon information and belief, Defendants DMF and FLF receive a majority of the appointments as post judgment domestic relations receiver from Defendants within the seven (7)

county metropolitan area and are the persons who have actively solicited and encouraged Defendants to illegally make use of this device, in violation of applicable law, as a child support enforcement mechanism.

53. On or about September 30, 1999, the United States District Court, Eastern District of Michigan, the Hon. Denise Paige Hood presiding, issued its Declaratory Judgment in favor of Plaintiff and against Defendants and declaring the SCOs and BWs issued by said Defendants to be illegal and unconstitutional in violation of Plaintiff's federally protected, constitutionally guaranteed right to due process of law under the 5th and 14th Amendments to the U.S. Constitution. See, Exhibit G.

53. Upon information and belief, DMF and FLF have charged and propose to have Defendant WCCC asses against Plaintiff $17,348.25 in excessive and unreasonable receiver/attorney fees and costs for acting as a post judgment domestic relations receiver over

54. Plaintiff; without having collected any support whatsoever, or, performing any acts as receiver; and, which they expect Defendant WCCC to approve and impose against Plaintiff in violation of MCR 6.222. See, Exhibit F.

COUNT III: LICENSE SUSPENSIONS
VIOLATION OF MICHIGAN CONSTITUTION

55.Plaintiff incorporates by reference the allegations contained in paragraphs 1-54 above.

56.Article I, Section 17 of the Michigan Constitution provides, in relevant part:

> " No person... shall be deprived of life, liberty or property without due process of law. The right of individuals ... to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed."

56. Article III, Section 2 of the Michigan Constitution provides, in relevant part, as follows:

> " The powers of government shall be divided into three branches: legislative,

executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this Constitution."

58.Article VI, Section 28 of the Michigan Constitution provides in relevant part:

> " All final decrees, findings, rulings and orders of any administrative officer or agency ... which are judicial or quasi judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law."

59. MCLA 24.201 et se., the Michigan Administrative Procedures Act, ("APA") defines the term "licensing" to mean and include the issuance, suspension, renewal, and revocation of a license; vests exclusive jurisdiction over licensing in the appropriate state administrative/licensing agency (s); and, limits the jurisdiction of a circuit court over licenses and licensing to appellate review of any act or decision of a licensing agency by which a licensee deems himself to be aggrieved.

60.The APA created and requires an extensive framework of procedural due process, including

notice, hearings and other statutory safe guards, designed specifically to protect and preserve the constitutional rights of a licensee to due process of law; which rights may not be violated or abridged.

61.MCLA 552.628 and the various and sundry related provisions of the Act and the Enforcement

Act purport to vest in the circuit courts of Michigan, and/or their agents "offices of friend of court", original jurisdiction to suspend licenses.
62.The circuit courts and their agents "offices of friend of court" are constitutionally forbidden from exercising original jurisdiction over a license or to engage in any act of licensing in Michigan; and, are strictly limited solely to the exercise of appellate jurisdiction over the acts and decision of the particular licensing agency to whom original jurisdiction is granted by statute to act in respect of any particular license.

63. Michigan circuit courts and " offices of friend of court" are members of the judicial branch of government, not the executive branch; are not executive or administrative licensing agencies; and, may not exercise original licensing jurisdiction over a license in Michigan.
64.MCLA 552.628 is unconstitutional on its face under the Michigan constitution as it:

A. Violates the Separation of Powers Clause, Article III, Section 2, by usurping the original jurisdiction of the administrative licensing agency, properly exercised by the executive branch, and, vests such jurisdiction in the judicial branch.

B. Violates the Administrative action clause, Article VI, Section 28, by vesting original jurisdiction over private licenses in a circuit court which is limited, by express constitutional mandate solely to appellate jurisdiction over administrative actions and decisions affecting private licenses.

C. Violates the Due Process Clause, Article I, Section 17, as it abridges and denies the holder of a private license the right to just and fair treatment, as proscribed in the APA, by the administrative licensing agency properly vested with original jurisdiction over the private license and the process of licensing; and, attempts to illegally substitute therefore the original jurisdiction of the circuit court.

Wherefore, Plaintiff respectfully requests this Court issue its Declaratory Judgment declaring MCLA 552.628 unconstitutional under the Michigan Constitution; ordering the immediate rescission of all license suspensions

ordered by Defendants circuit courts and all other circuit courts in Michigan pursuant to MCLA 552.628 since January 1, 1997; and, permanently enjoining all further and additional suspensions of any license by Defendants or by any circuit court or "office of friend of court" in the state of Michigan pursuant to MCLA 552.628.

COUNT IV: LICENSE SUSPENSIONS
VIOLATION OF U. S. CONSTITUTION

65. Plaintiff incorporates by reference the allegations contained in Paragraphs 1-64 above.

66. The 5th Amendment to the U.S. Constitution provides that no person shall be deprived of life, liberty or property without due process of law.
48. The 14th Amendment to the U.S. Constitution provides that no state shall deprive a person of life, liberty or property without due process of law.

66. The right to due process of law in connection with state regulation of rights and privileges affecting the issuance, suspension, renewal and revocation of licenses is a fundamental right protected by and guaranteed under the U.S. Constitution.

67. Plaintiffs and the members of the class have a fundamental federally protected, constitutionally guaranteed right under the U.S. Constitution to

have the State of Michigan respect, enforce, and, protect the jurisdictional and procedural rights

68. created under the Michigan Constitution, and, by statute, including the APA, to proper notice, hearing, administrative action and decision in connection with the issuance, suspension, renewal and revocation of licenses.

68. Defendant State of Michigan and its licensing agencies are bound to follow both the constitutionally and statutorily created standards and procedures governing licensing in the State of Michigan and the failure or refusal to do so violates the federally protected, constitutionally guaranteed rights of Plaintiff and the members of the class to due process of law under the U.S. Constitution.

Wherefore, Plaintiff respectfully requests this Court issue its Declaratory Judgment declaring MCLA 552.628 unconstitutional under the 5th and 14th Amendments to the U.S. Constitution; ordering rescission of all license suspensions ordered by Defendants circuit courts and all other circuit courts in Michigan pursuant to MCLA 552.628 since January 1, 1997; and, permanently enjoining further and additional suspensions of licenses by Defendants circuit courts and all other circuit courts in Michigan pursuant to MCLA 552.628.

COUNT V : LICENSE SUSPENSIONS
VIOLATON OF MICHIGAN STATUTE

50. Plaintiff incorporates by reference the allegations contained in paragraphs 1-70 above.

51. Upon information and belief, the policies, procedures and practices employed by Defendants WCCC and WCFOC for the suspension of licenses under MCLA 552.628 is authorized and proscribed by Defendant FOCB in the name and on behalf of Defendant State of Michigan, and, is substantially identical to the policies, procedures and practices employed by all Defendants circuit courts and "offices of friend of court" and by all circuit courts and "offices of friend of courts" throughout the State of Michigan.

52. The letter filed by Defendant WCFOC to initiate proceedings in Defendant WCCC, See, Exhibit A, and the procedures followed by Defendant WCFOC in its attempt to suspend Plaintiff's license failed to comply with or conform to the requirements of MCLA 552.628 as follows:

A. Defendant WCFOC failed and refused

B. to issue the mandatory statutory notice required under MCLA 552.628(2)

C. Defendant WCFOC failed and refused to comply with the mandatory statutory notice time period required by MCLA 552.628(2)(c).

D. Defendant WCFOC failed and refused to file a proper "Petition" as required by MCLA 552.628(2) and by MCR 2.119.

E. Defendant WCFOC failed to serve a proper "Petition" or give required notice for requesting or obtaining relief from a circuit court as required by MCR 2.119

53. Upon information and belief, the failure and refusal to comply with the requirements and conditions of the statute was and is part of a willful and intentional practice on the part of Defendants WCCC and WCFOC and all Defendants circuit courts and "offices of friend of court" to expedite enforcement of support orders and collection of support by intentionally disregarding the statutory and constitutional rights of support payers in

54. order to reflect favorable enforcement statistics; and, thereby, to avoid penalties and reductions in federal revenue sharing for failure to meet or exceed federally established quotas and standards for enforcement and collection of child support.

55.The failure to follow known and established standards, conditions and requirements established by Constitution, statute or court rule, whether willful or negligent, violates the statutory and constitutional rights of Plaintiff and the members of the class to due process of law under both the U.S. and Michigan Constitutions.

Wherefore, Plaintiff respectfully requests this Court issue its Declaratory Judgment declaring the policies, practices and procedures approved and authorized by Defendant FOCB and used and employed by Defendants circuit courts and "offices of friend of court" to be illegal, unconstitutional, and, to violate the due process clauses of the U.S. and Michigan Constitutions; ordering rescission of all license suspensions by these Defendants and by all circuit courts in Michigan pursuant to MCLA 552.628 since January 1, 1997; and, permanently enjoining the further suspension of licenses by these Defendants and by all circuit courts and "offices of friend of court" in

Michigan until such time as lawful and proper procedures which protect the rights of support payers in Michigan and guarantee proper notice, hearing and due process in accordance with the requirements of law are enacted and followed.

COUNT VI: POST JUDGMENT DOMESTIC RELATIONS RECEIVERSHIPS FACIAL VIOLATION OF MICHIGAN CONSTITUTION

55. Plaintiff incorporates by reference the allegations contained in paragraphs 1-75 above.

56. Article I, Section 17 of the Michigan Constitution forbids the taking of private property without due process of law.

57. MCLA 552.625b authorizes the seizure and sale of the real and personal property of support payers in Michigan by the "office of friend of court"; and, for the appointment of post judgment domestic relations receivers by the "office of friend of court".

58. MCLA 552.625b is unconstitutional on its face as it purports to vest in "offices of friend of court" judicial power and authority to: (a)seize real and personal property; (b)

59. order real and personal property sold and proceeds of that sale applied; and, (c) appoint a receiver over a support payer; powers which may only be exercised by a judge.

60. The "office of friend of court" is an investigative and enforcement arm of the circuit court that is empowered only to conduct investigations and make recommendations.

61. The "office of friend of court" has no statutory or constitutional power or authority to "order" anything; and, its recommendations are non binding, not final, and, of no legal effect or consequence whatsoever.

62. Action may only be taken against a payer of support, or, the real and personal property of a payer of support upon the express, written and properly entered order of a judge.

63. Delegation of judicial power and authority to a person or agency that is not a duly elected judge violates the Due Process Clause and the Separation of Powers Clause of the Michigan Constitution and infringes upon the constitutional rights of

Plaintiff and the members of the class.

Wherefore, Plaintiff respectfully requests this Court issue its Declaratory Judgment declaring MCLA 552.625b unconstitutional under the Michigan Constitution; rescinding all appointments of post judgment receivers, all seizures and sales of real and personal property made pursuant to MCLA 552.625b by these Defendants and by all "offices of friend of court" in Michigan; ordering restitution of all such property and/or the proceeds of any such sales; ordering an accounting for all such property or proceeds seized or sold and any and all fees, expenses and costs incurred or deducted from such property or proceeds; and, permanently enjoining these Defendants and all circuit courts and "offices of friend of court" in Michigan from and against the seizure and sale of real and personal property of support payers, and, the appointment of post judgment domestic relations receivers pursuant to MCLA 552.625b.

COUNT VII: POST JUDGMENT DOMESTIC RELATIONS RECEIVERS FACIAL VIOLATION OF U.S. CONSTITUTION

62. Plaintiff incorporates by reference the allegations of paragraphs 1-83 above.

64. The 5th Amendment to the U.S. Constitution forbids the taking of private property without due process of law; and, without just compensation.

65. The 14th Amendment to the U.S. Constitution forbids Defendant State of Michigan and any of its agencies or political subdivisions from taking private property without due process of law, and, without just compensation.

66. The delegation and exercise of judicial power and authority to seize and sell real and personal property of support payers, and, to appoint post judgment domestic relations receivers over support payers and their real and personal property, to persons or agencies not duly elected and empowered to act as judges violates the 5th and 14th Amendments to the U.S. Constitution and deprives payers of support of their federally protected, constitutionally guaranteed rights to due process of law under the U.S. Constitution.

Wherefore, Plaintiff respectfully requests this Court issue its Declaratory Judgment declaring MCLA 552.625b unconstitutional under the U.S. Constitution; rescinding all seizures and sales of real and personal property and all appointments of post judgment domestic relations receivers by these Defendants and by all other circuit courts and "offices of friend of court" in Michigan made pursuant to MCLA 552.625b since August 10, 1998; ordering restitution of all real and personal property of support payers seized by these Defendants and by all other circuit courts and "offices of friend of court" in Michigan or by their post judgment domestic relations receivers pursuant to MCLA 552.625b since August 10, 1998; ordering an accounting for any such property seized or sold and for all fees, costs and expenses paid or deducted from such property or proceeds; and, permanently enjoining these Defendants and all circuit courts and "offices of friend of court" in Michigan from and against the seizure and/or sale of private property, and, the appointment of post judgment domestic relations receivers pursuant to MCLA 552.625b.

COUNT VIII: POST JUDGMENT DOMESTIC RELATIONS RECEIVERSHIPS FEDERAL AND STATE CONSTITUTIONAL AND STATE STATUTORY VIOLATIONS AND PRACTICES

67. Plaintiff incorporates by reference the allegations contained in paragraphs 1-87 above.

68. MCLA 552.603 provides that a support order issued by a Michigan court shall be enforced as provided in that section; and, that each support payment due under such support order becomes a Judgment as of the date each such payment is due.

69. MCLA 552.625a provides that the judgment lien created pursuant to MCLA 552.603 attaches to the real and personal property of a support payer.

70. MCLA 552.625b provides the exclusive statutory scheme and mechanism for the perfection, enforcement and satisfaction of liens created under MCLA 552.603 and attaching to the real and personal property of a support payer under MCLA 552.625a.

71. MCLA 552.625b provides that a lien for child support may not be perfected or enforced against the real and personal property of a support payer in Michigan, with or without the appointment of a post judgment domestic relations receiver, until:

A. The amount of a support arrearage/Judgment exceeds one(1) years support payments due under the support order.

B. Prior written notice of: (1) the creation and imposition of a statutory lien; and, (b) that real and personal property of the payer can be encumbered and seized; is given to any payer whose support order pre-dates the enactment of the statute.

C. Written notice is given to the payer of the perfection of the lien against real and personal property containing all the information required by MCLA 552.625b(7) (a)-(e).

D. Written notice is given the payer of his right to demand a review of any alleged error of fact, and/or to request a modification of the support

order.

E. The statutory 21 day notice period elapses without the payer requesting either review or modification

F. If a review is requested, the review is conducted within 14 days of the date of request.

G. Prior written notice is given the payer, either in person at a review, or, in writing, of the intent to levy and seize the payer's real and personal property.

72. Real and personal property of a payer of child support in Michigan may not be seized or sold, with or without the appointment of a post judgment domestic relations receiver, without full and complete compliance with the requirements and conditions of MCLA 552.625b.

73. MCLA 552.625b(13) provides that a statutory lien created by MCLA 552.603, which attaches to real and personal property of a support payer by virtue of MCLA 552.625a, is subordinate only to any prior, perfected lien.

74. MCLA 552.625b(14) provides that when a payer of support is no longer in arrears, the lien perfected against real and personal property must be terminated.

75. Defendants WCCC and WCFOC failed and refused to comply with the requirements or provisions of MCLA 552.625b when they appointed a post judgment receiver to size the real and personal property of Plaintiff on or about February 25, 1999.

76. Upon information and belief, all Defendants as well as all other circuit courts and "offices of friend of court, operating under the practices and procedures proscribed and approved by Defendant FOCB in the name and under the authority of Defendant State of Michigan, customarily and regularly fail and refuse to comply with the requirements and provisions of MCLA 552.625b in connection with the seizure and sale of real and personal property of support payers in Michigan; whether done directly, or, through the use of post judgment domestic relations receivers.

77. Upon information and belief, all Defendants as well as all circuit courts and

"offices of friend of court" , operating under the practices and procedures proscribed and approved by Defendant FOCB in the name and under the authority of the State of Michigan, customarily fail and refuse to fully and properly account to support payers for real and personal property seized by them, and for application of the proceeds thereof; whether done directly or through the use of a post judgment domestic relations receiver, as required by law.

78. Upon information and belief, every direct seizure of real and personal property by these Defendants and by circuit courts and "offices of friend of court" in Michigan since August 10, 1998, has violated the mandatory provisions and requirements of MCLA 552.625b and is illegal and unconstitutional.

79. Upon information and belief, Defendants DMF and FLF have received the overwhelming majority of appointments from Defendants to act as post judgment domestic relations receivers in the seven (7) county metropolitan area to effectuate the seizure and sale of real and personal property of support payers as a means to enforce support orders.

78. Upon information and belief, every appointment of DMF and FLF as post judgment domestic relations receivers since August 10, 1998 has violated the mandatory provisions and requirements of MCLA 552.625b and is illegal and unconstitutional for the reasons that:

A. Mandatory statutory notices, hearings, and, procedures have not been followed or complied with, and, therefore, payers have been denied mandatory due process of law as guaranteed under both the U.S. and Michigan Constitutions in connection with such appointments.

B. Many of these appointments, as in the case of Plaintiff, have been done by suae sponte and/or ex-parte judicial appointment, without even the basic notice, hearing or opportunity to be heard otherwise applicable to any action, application, or, request for relief from or to a court of law; thereby depriving payers of their basic constitutional rights to due process of law under the U.S. and Michigan Constitutions in any judicial proceeding.

80. Upon information and belief, DMF and FLF have illegally seized and liquidated substantial amounts of real and personal property of support payers under color of state law to enforce support orders since August 10, 1998; all without statutory compliance and in violation of payers' constitutional rights to due process of law.

81. Upon information and belief, the seizures and liquidations of real and personal property of support payers by DMF and FLF have been at or for less than full, fair or reasonable value and have, therefore, deprived support payers of just compensation for the taking of their property.

82. Upon information and belief, DMF and FLF have illegally charged excessive and unreasonable fees, costs and expenses against support payers, their real and personal property, and/or, the proceeds of the sale of said property in connection with these illegal and unconstitutional appointments and seizures and sales.

83. Upon information and belief, the fees and expenses charged by DMF and FLF were illegally given priority over and paid ahead

of the statutory higher priority lien for support in favor of the support recipient in violation of MCLA 552.603, 625a, and, 625b, thereby illegally reducing the amount of proceeds available to credit against and reduce support arrearages and illegally extending and continuing these illegal receiverships; and, increasing the fees payable to DMF and FLF contrary to applicable law.

84. Upon information and belief, DMF and FLF have failed and refused to properly and fully account for and pay over the proceeds from the illegal seizure and sale of real and personal property in the course of these illegal and unconstitutional post judgment domestic relations receiverships through the charging of illegal, excessive and unreasonable fees, and, the improper payment of their own fees and costs ahead of prior superior liens for past due support.

85. Upon information and belief, these Defendants circuit courts and "offices of friend of court" have and continue to illegally fail and refuse to terminate these illegal and unconstitutional post judgment domestic relations receiverships upon: (a) payment of the support arrearages and termination of the statutory lien; and/or, (b) reduction of the arrearage to and below one

86. (1) years support payments; as required by law, and, thereby, continuing such illegal and unconstitutional receiverships indefinitely as a means of securing future support enforcement without future compliance with the requirements and provisions of applicable law.

87. DMF and FLF have been unjustly and illegally enriched through their illegal and unconstitutional appointments as post judgment domestic relations receivers, by and in concert with these Defendants circuit courts and "offices of friend of court", in violation of applicable statutes and without due process of law; through the charging of illegal, excessive and unreasonable fees illegally and unconstitutionally charged by DMF and FLF with the knowledge and complicity of these Defendants circuit courts and "offices of friend of court"; through the misapplication of proceeds of the sale and liquidation of real and personal property of support payers throughout the seven (7) county metropolitan area; and, through the failure to fully and properly account for and pay over the proceeds of such seizures and sales of real and personal property.

Wherefore, Plaintiff respectfully requests this Court issue its Declaratory Judgment declaring the seizure and sale of real and personal property of support payers, and, the appointment of post judgment domestic relations receivers, in violation of and/or without full compliance with the conditions and requirements of MCLA 552.625b to be illegal, invalid, and, in violation of the U.S. and Michigan Constitutions; ordering rescission of all such illegal and unconstitutional seizures and sales of real and personal property, and, all appointments of post judgment domestic relations receivers since August 10, 1998 in violation of statute and the U.S. and Michigan Constitutions; ordering an accounting for all such seizures sales, and, appointments, and, of the application of all proceeds thereof; ordering restitution of all illegally and unconstitutionally seized real and personal property and/or proceeds of the sale thereof, whether or not through the device of a post judgment domestic relations receiver; ordering restitution of all fees, costs and expenses paid to, for , or, on behalf of DMF, FLF, and/or any and all other such illegally appointed receivers; and, permanently enjoining these Defendants and all other circuit courts and "offices of friend of court" in Michigan from and against: (a) further and future seizures and sales of real and personal property of support payers in the State of Michigan, with or without the appointment of post judgment domestic

relations receivers, without full compliance with and/or in violation of applicable law, (b) further and future appointment of post judgment domestic relations receivers without full compliance with and/or in violation of applicable law, and, (c) the further and future illegal use of liens, encumbrances, sales and/or seizures of real and personal property of support payers in Michigan, through any device, as a child support enforcement and collection mechanism.

COUNT IX: VIOLATION OF STATUTE AND COURT RULES ILLEGAL AND UNCONTITUTIONAL REFEREE AND JUDICIAL HEARINGS

88. Plaintiff incorporates by reference the allegations contained in paragraphs 1-107 above.

89. The Michigan Friend of Court Act ("Act"), being MCLA 552.501,et. seq., creates and establishes the "office of Friend of Court" ("FOC") as an investigatory and fact finding arm of the circuit court in domestic relations matters in Michigan.

90. Section 7 of the Act, being MCLA 552.507, specifically proscribes the powers and duties of FOC and its referees and expressly limits the power and authority of FOC and

its referees to the conduct of investigations and hearings and the making of written reports and recommendations.

91. Section 7(5) of the Act, being MCLA 552.507(5) specifically preserves and guarantees the right of every domestic relations litigant in Michigan to a de novo evidentiary judicial hearing on demand.

92. MCR 3.215 clearly proscribes the mandatory procedures which FOC must follow in the conduct of fact finding hearings; makes clear that the power and authority of the FOC is limited to the making of written reports and recommendations; makes clear that every domestic relations litigant in the State of Michigan is absolutely entitled to a de novo evidentiary judicial hearing by a judge on demand; and, makes clear that actions, decisions and orders binding and affecting domestic relations litigants in the State of Michigan may only be taken, made or entered by a Judge.

93. The required procedures for conducting FOC hearings under MCR 3.215 include:

i. give notice of the hearing and the subject matter to the parties and counsel.

ii. give a clear statement that the matter will be heard by a referee

ii. Apply the Michigan Rules of Evidence in the conduct of all referee hearings, including but not limited to: (1) the admission of documentary evidence; and, (2) the admission of only sworn testimony of witnesses and parties in compliance with the rules.

iii. Give two (2) notices, (one oral and one written) of the right to a de novo evidentiary hearing before a Judge.

iv. Make a mandatory electronic or stenographic record

v. Make specific findings of fact, and, a summary of all testimony either (1) orally on the record; or (2) by a written and signed report which must be served on the parties.

vi. Prepare a written

recommendation for an Order

vii. Serve the written recommendation and Proposed Order on the parties and/or counsel

viii. File a proof of service of the recommendation and Proposed Order with the Court.

ix. No order may enter and no action may be taken until twenty one (21) days afterservice of the written recommendation and Proposed Order.

94. Defendants circuit courts and "offices of friend of court", pursuant to practices, procedures and guidelines proscribed and approved by Defendant FOCB in the name and under the authority of Defendant State of Michigan, maintain a continuing and ongoing pattern and practice of violating and ignoring the mandatory provisions and requirements of the statute and the court rule in the conduct of FOC hearings and proceedings for the determination, modification and enforcement of child support, custody, and, parenting time orders by:

i. failing and refusing to serve proper notice of hearings on

domestic relations litigants as required by law.

ii. Failing and refusing to clearly and completely disclose the matter to be heard.

iii. Failing and refusing to apply the Michigan Rules of Evidence in such hearings and proceedings by:

(1)refusing to admit proper documentary evidence; (2) refusing to admit witness testimony; (3) admitting testimony of parties not conforming to the rules of evidence; (4) refusing to admit cross examination; and, (5) permitting FOC employees and attorneys to enter facts in the record, as evidence, without sworn testimony, without documentary support, and, without proper cross examination.

iv. Failing and refusing to provide litigants the two (2)

notices (usually the written one) of the right to de novo judicial evidentiary hearing

v. Failing and refusing to make the required specific findings of fact, and, summary of testimony; and, the written reports thereof.

vi. Failing and refusing to provide written recommendations and Proposed Orders

vii. Failing and refusing to properly serve written recommendations and Proposed Orders on parties and/or counsel

viii. Failing and refusing to file proof of service of items (e), (f) and (g) with the court

ix. Failing and refusing to comply with the twenty one (21) day period for de novo judicial evidentiary hearing required by the rule.

95. Defendant "offices of friend of court" pursuant to practices, procedures and guidelines proscribed and approved by Defendant FOC in the name and under the authority of Defendant State of Michigan, maintains a continuing and ongoing pattern and practice of violating and ignoring the provisions, requirements and limitations of the Act and the court rule by:

    i. illegally issuing SCOs without the direct involvement, participation and decision of a Judge.

    ii. Illegally issuing BWs without the direct involvement, participation and decision of a Judge.

    iii. Illegally setting terms and conditions of bond, custodial incarceration, and/or release without the direct involvement, participation and decision of a Judge.

96. Defendants circuit courts maintain a continuing and ongoing pattern and

practice of violating the statute and court rule by knowingly and intentionally permitting Defendants "offices of friend of court" to conduct proceedings in accordance with practices and procedures which Defendants circuit courts know, or have every reason to know, fail to conform to and comply with the standards and requirements of law and the rules.

97. Defendants circuit courts maintain a continuing and ongoing pattern and practice of violating the statute and court rule by knowingly and intentionally delegating to and permitting Defendants "offices of friend of court" to exercise judicial power and authority which Defendants circuit court know, or, have every reason to know, are exclusively reserved by law and constitutional mandate only to judges and may not be exercised by FOC.

98. Defendants circuit courts maintain a continuing and ongoing pattern and practice of violating the statute and the court rule by knowingly and intentionally failing and refusing to conduct full, complete and proper de novo judicial evidentiary hearings on the demand of a party, which they know, or, have every

reason to know, is mandatory and constitutionally guaranteed.

99. The illegal and improper conduct of Defendants "offices of friend of court" and Defendants circuit court occur in the context of all day to day activities and proceedings conducted by these Defendants; but, particularly in the conduct of:

i. child support determination and modification

ii. child support enforcement

iii. parenting time enforcement and compliance

100. Defendant "offices of friend of court" maintain a continuing and ongoing pattern and practice of failing and refusing to fully and properly investigate, act upon, and, enforce the terms of parenting time orders and the violation of and failure to comply with parenting time provisions/orders of the Defendants circuit courts, including:

i. failing and refusing to investigate, conduct necessary hearings and proceedings, and, enforce court ordered parenting time orders against custodial parents and in favor of non custodial parents

ii. failing and refusing to adopt, maintain and enforce statutorily required policies and standards for make up parenting time.

iii. Failing and refusing to initiate and complete statutorily required enforcement actions and proceedings against custodial parents on behalf of non custodial parents to enforce and insure ongoing compliance with the orders of Defendants circuit courts for parenting time.

101. Defendants circuit courts and Defendants "offices of friend of court" knowingly and intentionally fail, refuse and disregard the statutorily mandated obligation to enforce and insure compliance with parenting time

orders and matters in favor of and in order to conduct excessively and disproportionately higher numbers of support actions and proceedings for the reasons that:

i. support matters/enforcement statistics directly impact federal funding standards and the amount of federal revenue sharing received by Defendant State of Michigan.

ii. Parenting time matters/enforcement does not directly impact federal funding standards and the amount of federal revenue sharing received by Defendant State of Michigan.

102. Defendants circuit courts maintain a continuing pattern and practice of violating applicable state statutes and court rules as well as known federal and state constitutional standards by knowingly and intentionally jailing and incarcerating child support payers in Michigan for failure to pay child support:

i. without proper notice

ii. without full and proper evidentiary hearings

iii. without advising child support payers of their constitutional right to counsel

iv. without providing qualified child support payers with court appointed counsel

v. without properly distinguishing and applying known constitutional standards and distinctions between "civil contempt" matters, and, "criminal contempt" matters.

vi. Without following or complying with statutory provisions, presumptions, and, requirements, including various required alternatives to incarceration.

103. Upon information and belief, various and sundry Defendant circuit courts and their members have maintained a pattern and

practice of conducting highly publicized and televised "round ups" of allegedly delinquent child support payers in Michigan solely for the purpose of garnering publicity at or around the time of or in support of their own judicial campaigns and elections.

104. Defendants circuit courts maintain a continuing pattern and practice of violating applicable state statutes, court rules, and, known state and federal constitutional standards by knowingly and intentionally engaging in:

i. the illegal and unconstitutional suspension of licenses of child support payers in Michigan in violation of applicable law; in violation of applicable statutes; and, without due process of law.

ii. The illegal and unconstitutional seizure and sale of real and personal property of child support payers in Michigan in violation of applicable law; in violation of applicable statutes and court rules; and, without due process of law or just

compensation.

iii. The illegal and unconstitutional appointment of post judgment domestic relations receivers over child support payers in Michigan in violation of applicable law; in violation of applicable statutes; and, without due process of law.

105. Upon information and belief, the policies, practices and procedures used or followed by these Defendants in the course of and to carry out the illegal conduct herein complained of are known to, proscribed by, approved by, and, carried out in accordance with the direction and under the supervision of Defendant FOCB in the name and on behalf of Defendant State of Michigan.

106. The conduct complained of herein by and on behalf of these Defendants violates the rights of Plaintiff and all members of the class protected and guaranteed under the provisions of the Michigan Constitution.

107. The conduct complained of herein by and on behalf of these Defendants violates the

federally protected, constitutionally guaranteed rights of Plaintiff and all members of the class to due process of law under the 5th and 14th Amendments to the U.S. Constitution.

108. The conduct complained of herein by and on behalf of Defendants circuit courts, specifically, violates the Supremacy Clause, Article VI, of the U.S. Constitution which provides that the Constitution and laws of the United States shall be the supreme law of the land and the judges of every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

Wherefore, Plaintiff respectfully requests this Court issue its Declaratory Judgment declaring the actions, practices and procedures used, applied, engaged in, and, complained of herein directed at Plaintiff and the members of the class to be illegal, unconstitutional, and, in violation of applicable statutes and court rules; permanently enjoining these Defendants, each and every one of them, and, the remaining circuit courts and "offices of friend of court" in Michigan from and against further, additional and future violations of applicable statutes, court rules, and, violations of the rights of

Plaintiff and the members of the class guaranteed

and protected under the Michigan and U.S. Constitutions; and, ordering Defendants FOCB and State of Michigan to prepare, implement and enforce policies, practices, procedures and guidelines specifically designed to prevent further violations and illegal conduct by these Defendants and all circuit courts and "offices of friend of court" in Michigan, and, to protect and enforce the rights of Plaintiff and the members of the class guaranteed under the Michigan and U.S. Constitutions.

COUNT X: CLASS ACTION ALLEGATIONS

130. Plaintiff brings this action as a class action pursuant to MCR 3.501 on behalf of all persons within the seven (7) county metropolitan jurisdictions, and, throughout the State of Michigan, subject domestic relations parenting time orders and post judgment enforcement and collection of child support in domestic relations actions.

131. The members of the class are so numerous that joinder of all members is impracticable. The disposition of these claims in a class action will provide substantial benefits to the parties and the Court. During the

Class Period, it is estimated that more than Two Million (2,000,000) persons within the State of Michigan were and remain subject to post judgment enforcement and collection of child support.

132. There is a well defined community of interest in the questions of law and fact involved in this case. The questions of law and fact common to the members of the Class which predominate over questions which may effect individual Class members include the following:

(a). Whether Defendants have and continue to violate the provisions of the U.S. and Michigan constitutions in connection with post judgment enforcement of parenting time orders and collection of child support; and, specifically, the illegal suspension of licenses and the illegal seizure and taking of private property without due process of law.

(b) Whether Defendants have and continue to violate Michigan statutory requirements and standards in connection with the post judgment enforcement of parenting time orders and collection of child support; and, specifically, the illegal suspension of licenses and the illegal seizure and taking of private property without due process of law.

(c) Whether Defendants have and continue to violate the requirements and standards of applicable Michigan Court Rules in connection with the post judgment enforcement of parenting time orders and collection of child support; and, specifically, the illegal suspension of licenses and the illegal seizure and taking of private property without due process of law.

(d) Whether Defendants know, have reason to know, or, recklessly disregard applicable constitutional, statutory and rule standards, guidelines, protections, and, requirements in the course of post judgment enforcement of parenting time orders and collection of child support; and, specifically, the illegal suspension of licenses and the illegal seizure and taking of private property without due process of law.

(d) Whether Defendants and their agents should be compelled to account for and disgorge illegal profits, payments and revenues generated from and/or in the course of these illegal and unconstitutional actions; and, specifically, the illegal seizure and taking of private property without due process

of law.

(f) Whether Defendants and their agents should be compelled to make restitution for all private property illegally seized and taken in violation of constitutionally protected and guaranteed rights to due process of law and/or in violation of applicable standards and procedures imposed by statute and court rule.

133. Plaintiff's claims are typical of those of the Class because Plaintiff and all other class members throughout the State of Michigan are subject to the identical regulatory, administrative, and, enforcement scheme, and, the constitutional, statutory, and, rule made rights, standards, and, protections which have and continue to be violated are identical.

134. The prosecution of separate actions by individual Class members would create a risk of inconsistent and varying adjudications and would confront Defendants with varying and incompatible standards of conduct.

135. The prosecution of separate actions by individual Class members would create a risk of inconsistent and varying adjudications that would, as a practical matter, be dispositive of the

interests of other absent members and would substantially impair or impede the ability of absent members to protect their interests.

136. Plaintiff will fairly and adequately assert and protect the interests of the Class. Plaintiff's counsel is experienced in complex constitutional, civil rights and governmental regulatory litigation. Plaintiff has no interests which conflict with those of the Class.

137. A class action is superior to other available methods for the fair and efficient adjudication of these issues for the reasons that: Final Declaratory and Equitable relief is requested and is appropriate with respect to the Class; and, In view of the complexity and expense of the litigation, the separate claims of individual class members are insufficient in amount to support separate actions.

JURY DEMAND

Now comes Plaintiff on behalf of himself and all members of the class and demands a trial by jury of all issues so triable.

Respectfully Submitted,

TROMBLY TINDALL P.C.

BY: MICHAEL E. TINDALL

(4)

Supreme Court, U.S.
FILED

011168 JAN 12 2002

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

MICHAEL E. TINDALL
Plaintiff-Petitioner
v.

WAYNE COUNTY FRIEND OF THE COURT, BY JOSEPH A. SCHEWE, Director of Legal Services; ALAN E. SKROK, Staff Attorney, Assistant Friend Of Court; WAYNE COUNTY SHERIFF'S DEPARTMENT, By: ROBERT FICANO, Sheriff; WAYNE COUNTY CIRCUIT COURT, FAMILY DIVISION, By: KIRSTEN FRANK KELLY, Presiding Judge; MICHAEL F.SAPALA, Chief Judge
Defendants-Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

APPENDIX III TO PETITION FOR A WRIT OF CERTIORARI

Michael E. Tindall
TINDALL & CO. P.C.
49 Macomb PL
Suite 29
Mt. Clemens MI 48043
(313) 640-4450

Counsel for the Petitioner

28 pp

Appendix H

STATE OF MICHIGAN
IN THE INGHAM COUNTY CIRCUIT COURT
GENERAL TRIAL DIVISION

MICHAEL E. TINDALL, individually and on behalf of all others similarly situated,

Plaintiff,

v. Docket No. 00-91216 AZ

THE STATE OF MICHIGAN; MICHIGAN STATE FRIEND OF COURT BUREAU; WAYNE COUNTY CIRCUIT COURT, FAMILY DIVISION; WAYNE COUNTY FRIEND OF COURT; OAKLAND COUNTY CIRCUIT COURT, FAMILY DIVISION; OAKLAND COUNTY FRIEND OF COURT; MACOMB COUNTY CIRCUIT COURT, FAMILY DIVISION; MACOMB COUNTY FRIEND OF COURT; MONROE COUNTY CIRCUIT COURT, FAMILY DIVISION; MONROE COUNTY FRIEND OF COURT; WASHTENAW COUNTY CIRCUIT COURT, FAMILY DIVISION; WASHTENAW COUNTY FRIEND OF COURT; LIVINGSTON COUNTY CIRCUIT COURT, FAMILY DIVISION; LIVINGSTON COUNTY FRIEND OF COURT GENESEE COUNTY CIRCUIT COURT, FAMILY DIVISION; GENESEE COUNTY FRIEND

OF COURT; DAVID M. FINDLING, ESQ.; and FINDLING LAW FIRM, PLC,

Defendants.

This Court, having considered Motions for Summary Disposition filed by all Defendants, having considered Plaintiffs Motion for Extension of Time to File a Motion for Class Certification, and having heard oral arguments on May 5, 2000, issues the following Opinion and Order.

OPINION

FACTS

Plaintiff; a licensed attorney in the State of Michigan, was divorced in Wayne County in 1991. Until recently, Wayne County has retained jurisdiction over the child support matter in Plaintiff's divorce. Since the time of Plaintiff's divorce, *it* has been alleged that Plaintiff has not remained current on his child support obligations. As a result, Wayne County has taken steps to enforce its order of support. Specifically, the Wayne County Circuit Court has issued show cause orders, directing Plaintiff to show cause why he is not in violation of the Court's order. The Wayne County Circuit Court also appointed a

receiver to levy on the personal assets of Plaintiff

for his failure to pay child support and at one time, the Wayne County Friend of Court began to initiate procedures to revoke or suspend Plaintiff's license to practice law.

Plaintiff, in pro per, now brings this ten count Complaint alleging that MCL *5* 52.628; MSA 25.164(28) and MCL *552.625b;* MSA 25.164(25b) are unconstitutional. These statutes allow a circuit court to suspend a driver's license or an occupational license for the failure to pay child support and to place a lien upon property of payers who are delinquent on child support. Plaintiff also alleges that the Wayne County Circuit Court is violating MCL 552.507; MSA 25.176(7) when issuing show cause orders and bench warrants and that "upon information and belief' all of the other named counties follow the same procedures as Wayne County.

Among the relief requested is declaratory judgment that the statutes are unconstitutional, that the circuit courts and friend of courts should be enjoined from violating the procedures outlined in the above named statutes, that an accounting be conducted for all property seized in accordance with statute, that all license suspensions under the above statute be rescinded, and that restitution be granted for all property wrongfully taken.

ANALYSIS

All of the Defendants have brought Motions for Summary Disposition contending that this Court lacks subject matter jurisdiction and that Plaintiff lacks standing to bring this lawsuit. MCR 2.116(C)(4) and *(5).* When reviewing ~ motion for summary disposition under MCR 2.1 16(C)(4), the court must determine whether the pleadings demonstrate that the defendant is entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there is no genuine issue of material fact. *Faulkner* v *Flowers,* 206 Mich App *562,* 564; 522 NW2d 700 (1994). In reviewing a motion for summary disposition pursuant to MCR 2.11 6(C)(5), the court must consider the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties and determine whether defendant is entitled to judgment as a matter law. *Dep 't of' Social Services v Baayoun,* 204 Mich App 170; 514 NW2d 522 (1994).

I. Class Certification

Plaintiff has pled this matter in the form of a class action lawsuit. Pursuant to MCR 3.50 1(B)(1)(a), when a party files a class action suit, a motion for certification of the class must be brought within 91 days of the filing of the

complaint. This Complaint was filed on January 21,2000. Therefore, the motion for certification should have been filed on or before April 21, 2000. On April 14, 2000, Plaintiff filed a Motion to Extend the Time for Filing the Motion for Class Certification. Plaintiff alleges that the reason for the delay was that he received several of the motions for summary disposition on April 3, 2000. Additionally, Plaintiff asserts that a court may rule on MCR 2.116 motions before a class is certified and that the motions pending in this case will assist in determining the class. MCR 3.50 1(D)(3).

One Defendant has responded to this Motion, and contends that Plaintiff has not made an adequate showing as to why he did not file the motion for certification in a timely fashion. Also, Defendant contends that this case is not a good candidate for a class action since the case must involve common questions of law, and this case does not where each county applies different procedures in child support cases.

MCR 3.501(B)(1)(b) provides that the time for filing a motion for class certification may be extended on a motion for cause shown. No party has defined what "cause" means. Moreover, there is no case law interpreting this court rule. Therefore, the Court is treating this rule as requiring a showing of good cause.

Good cause generally means "a substantial

reason amounting in law to a legal excuse for failing to perform an act required by law." *Buchanan* v *City Council of Flint,* 231 Mich App 536, *544-545; 586* NW2d 573 (1998) (Citing *Franchise Management Unlimited, Inc* v *America's Favorite Chicken,* 221 Mich App 239, 246; 561 NW2d 123 (1997). Good cause has also been defined as "due diligence." *Bush* v *Beemer,* 224 Mich App 457, 462; *569* NW2d 636 (1997). Plaintiff has failed to demonstrate that he meets either standard.

Plaintiff has not attached an affidavit demonstrating cause for not filing a timely motion. In fact, Plaintiff has not alleged that he made a single effort to file the motion for certification on time. The motions for summary disposition were not filed until day 73 out of 91 . the very end of the motion period. Therefore, any affect the motions for summary disposition had are minimal. The Court is further persuaded that cause has not been shown where the Court inquired of Plaintiff during oral argument what individuals could represent an injury in each of the named counties and Plaintiff refused to disclose names. Additionally, although MCR 3.501(D)(3) permits a court to decide a MCR 2.116 motion prior to class certification, this provision in no way excuses the requirements of subsection (B).

Moreover, this case is not of the nature properly brought as a class action. MCR 3.501 (A)(1) states that a class action may be brought only

if:

(a) the class is so numerous that joinder of all members is impracticable;

(b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;

(c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

(d) the representative parties will fairly and adequately assert and protect the interests of the class; and

(e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

In this case, there are not questions of law and fact common to the members that predominate over questions affecting individual members. The individual county defendants have provided affidavits to the effect that the procedures followed are not the same as those followed in Wayne County. Therefore, each claim against each county defendant will vary based on the procedures each county employs in the

administration of its child support docket.

Furthermore, Plaintiff demonstrated during oral argument that the facts of each claim pertaining to an individual class member may vary greatly. For example, Plaintiff in this case has not had any property seized by any court as a result of his failure to pay child support. However, Plaintiff gave an example of a class member he would like to include in this action. This particular member had a gas station sold by Wayne County as a result of failure to pay child support. Plaintiff stated that as a part of this lawsuit, he would like an order from this Court voiding the sale of the gas station and returning the property to the plaintiff. Based on this example, the facts in these two cases are not similar. The interests of the members who actually have had property seized is much different than Plaintiff's, who has had no property taken. Therefore, the representative member could not fairly represent the interests of the class where their interest are very different in nature.

This point is further demonstrated by the fact that only one receiver has been named as a litigant in this lawsuit but, Defendant Findling is not the only receiver that has been appointed by any of the named county defendants or friend of court defendants. Therefore, it is clear that the allegations against Defendant Findling are merely those raised by Plaintiff himself, and do not represent claims by other potential class members

against unnamed appointed receivers in other counties.

For all of these reasons, Plaintiff has failed to demonstrate cause for an extension of time to file the motion for class certification.

II. Defendants 'Motions for Summary Disposition

A. Subject Matter Jurisdiction

The first issue raised by Defendants is that this Court lacks subject matter jurisdiction to hear the claims raised in this complaint. The question of subject matter jurisdiction is one of law for the court to decide. *DNR* v *Holloway Construction Co,* 191 Mich App 704, *705;* 478 NW2d 677 (1991). The burden is on the plaintiff to establish jurisdiction. *PhinneyvPerlmutter,* 222 Mich App *513, 521; 564* NW2d *532* (1997).

1. Nature of the Relief Sought

All of the Defendants have raised the argument that even though Plaintiff has couched his claims in terms of declaratory judgment and injunction, the relief sought is in the nature of superintending control and the Court should treat it as such. Furthermore, Defendants contend that this Court lacks subject matter jurisdiction to issue an order of superintending control against another circuit court or the friend of court. The relief requested by Plaintiff includes a declaration that MCL *552.628;* MSA 25.164(28) and MCL *552.625b;* MSA 25.1 64(25b) are unconstitutional,

an order rescinding all license suspensions, and an order returning all property seized pursuant to these statutes. Plaintiff further requests an order removing all receivers appointed by Defendants pursuant to MCL *552.625b;* MSA 25.164(25b), an accounting for all property seized pursuant to this statute and the retrieval of all such property, and prospective orders to all Defendants to not violate these named statutes in the future. Plaintiff in this case contends that one of several remedies he seeks is declaratory judgment and that it is not for Defendants to decide otherwise.

A circuit court is free to inquire into the true nature of the relief being sought in a complaint. *Ferency* v *Secretary of State,* 139 Mich App 677, 683; 362 NW2d 743 (1984). Moreover, when one court is called upon to review the generalized practices of another and issue a remedial order to change those practices, the only remedy available to resolve the matter is that of superintending control. *Cahill* v *Thomassen,* 393 Mich 137, 143; 224 NW2d 24 (1974); *Saginaw Public Libraries v Judges of the 70th Judicial District Court,* 118 Mich App 379, 392; 325 NW2d 777 (1982).

In *Cahill,* the plaintiff received a traffic ticket and appeared in district court to contest the ticket. The plaintiff challenged the district court's procedure of requiring a $35 appearance bond and contended that he was entitled to a jury trial. When the district court refused, the plaintiff

brought a class action suit seeking a writ of superintending control in the circuit court. Among the relief requested was an order demanding that the district court judge follow what the plaintiff believed to be the proper procedures for filing a bond and that each defendant in a traffic offense case be given a jury trial.

Like the plaintiff in *Cahill,* Plaintiff in this case has brought this claim in the form of a class action suit, requesting that this Court resolve his objections concerning the generalized practices of another court. Specifically, the manner in which other circuit courts issue notices of show cause hearings and interpret certain statutes under the Friend of Court Act. Therefore, the only remedy available is that of superintending control and the Court is treating this Complaint as such.

The next issue is whether this Court has subject matter jurisdiction to issue an order of superintending control over the circuit court Defendants. Const 1963, Art 6, § 4 states that the Michigan Supreme Court is vested with general superintending control over all courts. MCR

3.302(D) provides that the circuit court has jurisdiction to issue superintending control orders to "lower courts or tribunals." See also Const 1963, Art 6, § 13. Clearly, this umbrella ofjurisdiction does not cover the seven named circuit courts in this action. Likewise, with respect to the county friend of courts, under the Friend of

Court Act, the friend of court is an employee of the circuit court and is under the direct supervision of the chief judge. MCL *552.503(4)* and *(5);* MSA 25.176(3)(4) and *(5); Morrison* v *Richardson,* 198 Mich App 202, 212; 497 NW2d *506* (1992). Therefore, this Court equally lacks jurisdiction over the friend of court offices being sued in this matter, as they are merely an extension of the circuit court.

Additionally, the State Friend of Court Bureau is not a lower tribunal for which this Court may take superintending control over. Pursuant to MCL *552.519(1);* MSA 25.176(1 9)(1): "The state friend of the court bureau is created within the state court administrative office, under the supervision and direction of the supreme court." See also MCR 8.101. Thus, this Court does not have jurisdiction under MCR 3.302(D). The State Friend of Court Bureau is not an inferior tribunal to this Court where it is under the supervision and direction of the Supreme Court.

This case, at its essence, involves a request upon this Court to control the generalized practices of other circuit courts. The Court of Appeals has specifically addressed this issue in the case of *Morcom v Schemanske,* 15 Mich App 358, 360; 166 NW2d *540* (1968). In the *Morcom* case, the Court of Appeals stated:

> We are persuaded that the Supreme Court has delegated to us only the power to issue

> such writs of superintending control] in respect of a particular error in an actual case and controversy, and that we have not been delegated superintending control over the general practices of an inferior court or any judge thereof.

Likewise, this Court is without jurisdiction.

Even if this Complaint were to be treated as a request for declaratory judgment, rather than superintending control, this Court has no jurisdiction to grant the relief requested. In *Kioka* v *Brake*, 318 Mich 87; 27 NW2d 507 (1947), the Michigan Supreme Court stated:

> The judge further held that even if he were to assume that the one-man grand jury act was unconstitutional, the circuit court for the county of Wayne had no power to inform the Ingham county circuit court either by way of declaratory judgment, injunction or otherwise of the unconstitutionality of the act; and that the only way in which the Ingham county circuit court could be restrained from future action would be by writ of prohibition from the Supreme Court. The trial judge was correct.

In *Kioka*, the Plaintiff sued two Ingham County Circuit Court judges and the State of Michigan, requesting that the one-man grand jury statute be

deemed unconstitutional and requesting that the Ingham County Circuit Court be enjoined from applying this procedure. The Supreme Court upheld the dismissal of the case on the basis that the Wayne County Circuit Court had no authority to act on such a request. The court noted that the supervisory power over the circuit court belonged to the Supreme Court. Const 1963, art 6, § 4. This same principle applies to the case at bar. This Court is without authority to inform the Wayne County Circuit Court that the generalized procedures that it employs is unconstitutional and issue an order enjoining the court from further constitutional violation.

2. Money Damages

Defendants also contend that this Court does not have jurisdiction because Plaintiff has requested monetary damages, i.e. restitution, and therefore, this matter should be before the Court of Claims. *See* MCL 600.64 19(1)(a); MSA 27A.6419(1)(a). The Court of Claims has exclusive jurisdiction over claims of money damages against the State or State agencies. *Silverman* v *University of Michigan Board of Regents,* 445 Mich 209; 516 NW2d 54 (1994). Additionally, the Court of Claims has jurisdiction over claims of an unconstitutional taking. *DNR* v *Holloway Construction Co, supra.* Plaintiff responds that he is not asking for money damages, but rather he is requesting that the State be required to return any and all property taken in non-payment of child support cases.

Therefore, since all of the relief requested is equitable, this claim should be in the circuit court. AuSable Manistee Action Council, Inc v State of Michigan, 182 Mich App 596; 452 NW2d 832 (1989). Paragraph 86 of the Complaint requests "restitution of all such property and/or the proceeds of any such sales," as well as an injunction and an accounting. Requesting of proceeds is clearly a claim for money damages. However, the Court of Appeals stated in the case of *Mooahesh* v *Dep't of Treasury, 195* Mich App *551, 559;* 492 NW: d 246 (1992) that where a party seeks mainly equitable relief, and where a party only seeks a return of money alleged to be improperly taken, the circuit court does have jurisdiction. In *Mooahesh,* a class of lottery winners sued alleging that a statute that made lottery winnings taxable was unconstitutional. The class also sought return of taxes collected under the statute. The Court of Appeals determined in that situation that the circuit court had jurisdiction. Plaintiff is only seeking money damages to the extent that he is alleging that the property was lost as a result of an alleged constitutional violation. Therefore, with respect to the issue of money damages, the circuit court would have jurisdiction.

3. Defendant Findling and Findling Law Firm Court Appointed Receiver

Defendant Findling and the Findling Law Firm, the receiver appointed by the Wayne County

Circuit Court to collect overdue child support from Plaintiff, also contends that this Court lacks jurisdiction to hear any claims pertaining to alleged inappropriate procedures regarding his appointment and use of his authority. Defendant Findling asserts that his appointment may not be attacked collaterally and that he may not be sued without prior permission of the appointing court, Wayne County.

The Supreme Court stated in the case of *Westgate* v *Adams,* 293 Mich *559;* 292 NW 491 (1940), that the legality of an appointment of a receiver is not open to a collateral attack. Furthermore, the Court of Appeals in *Cohen* v *Bologna, 52* Mich App 149, 151; 216 NW2d *586* (1974), held that a court-appointed receiver is a ministerial officer of the court and cannot be sued without leave of the appointing court. In this case, Plaintiff has not sought permission from the Wayne County Circuit Court to bring this lawsuit.

Plaintiff responds that the *Cohen* case only applies to *in rem* cases and does not apply to personal actions against the receiver acting under color of law. Plaintiff contends that the case of *McAfees vBankers Trust Co,* 253 Mich *685;* 235 NW 807 (1931) demonstrates that a receiver may be sued without permission of the appointing court where it is alleged that the receiver has wrongfully taken property under color of state law. See also *Stephenson* v *Golden,* 279 Mich 710;276 NW2d 849 (1937).

In this case, it is undisputed that Defendant Findling has not taken action against Plaintiff's property. Plaintiff only alleges that since Findling was appointed as receiver, Findling has "constructively" taken Plaintiff's property. The essence of Plaintiffs complaint regarding the receiver is that the statute allowing the friend of court to appoint a receiver is unconstitutional and that the Wayne County Friend of Court and Defendant Findling did not follow proper procedures when Findling was appointed. These allegations are nothing more than a collateral attack on the appointment of Defendant Findling as receiver in this case. Defendant Findling has not taken any of Plaintiffs property. Thus, he could not have wrongfully taken the Plaintiffis property under color of law. Therefore, Plaintiff was required to obtain permission from the Wayne County Circuit Court prior to filing the instant action. His failure to do so leaves this Court without jurisdiction.

B. Standing

The next issue raised by Defendants is that Plaintiff lacks standing to bring this lawsuit. There is no allegation in the complaint that Plaintiff has ever been subjected to a license sanction as a result of a friend of court proceeding or that Plaintiff has ever had any property taken from him. Therefore, Plaintiff has not suffered and injury.

Standing is a legal term used to denote the existence of a party's interest in the outcome of litigation that will ensure sincere and vigorous advocacy. However, evidence that a party will engage in full and vigorous advocacy, by itself, is insufficient to establish standing. Standing requires a demonstration that the plaintiffs substantial interest will be detrimentally affected in a manner different from the citizenry at large. - *House Speaker* v *State Administrative Board,* 441 Mich *547, 554; 495* NW2d *539* (1993). Plaintiff must demonstrate an actual injury or a likely chance that he will suffer immediate injury different from the public. *Kuhn* v *Secretary of State,* 228 Mich App 319, 333; *579* NW2d 101 (1998).

Plaintiff responds that he has suffered an injury or is in imminent danger of suffering an injury. Specifically, he states that license sanctions were once sought against him. No sanctions were ever granted, however, because Plaintiff paid enough on his arrearages to stop the process. Additionally, Plaintiff contends that the Wayne County Circuit Court has appointed Defendant Findling as receiver in his case and that any day Findling could instigate attempts to take his property. Lastly, Plaintiff responds that this is a class action and that other members of the class have suffered actual injuries.

Since this is not a class action, the injuries

of potential class members is irrelevant. Moreover, it is clear on this record that Plaintiff has not suffered an actual injury or is in imminent danger of an injury upon which standing may be conferred. No license sanctions have been imposed and no property has been taken. And, Plaintiff cannot establish that he is under imminent threat of injury. With respect to all counties except Wayne, there has been no showing that they have taken any steps to issue any sanctions or take away any proçerty from Plaintiff. Therefore, any injury is merely hypothetical. As stated by the Michigan Supreme Court, a plaintiff may not contest the constitutionality of a statute unless the plaintiff can show an injury to his person or property. *Citizens for Pretrial Justice* v *Goldfarb,* 415 Mich *255,* 273; 327 NW2d 910 (1982). Any allegation of injury or imminent threat of injury by Plaintiff is not distinct from the citizenry at large.

Plaintiff also has not made a showing of injury or imminent threat of injury as a result of his dealings with Wayne County. Plaintiff contends that inappropriate show cause orders have been issued in his case and that the Wayne County Circuit Court has attempted to take away his license to practice law and his property. Plaintiff also argued that to this day, he suffers collateral effects from these constitutional violations.

Plaintiff cannot show any injury that has resulted from the application of MCL 552.526b; MSA 25.164(25b) to his divorce action. This statute provides:

> (12) To enforce a lien on real property or personal property other than an account at a financial institution, the office [of the friend of court] may order the sale of real property in the manner provided by law for the foreclosure of mortgage liens; order execution of the judgment; appoint a receiver of the real and personal property subject to the lien and order the property and its income to be applied to the amount of the judgment; or take any other appropriate action to enforce the judgment. The office shall mail a copy of orders under this subsection to the payer and recipient of support at his or her last known address.

In this case, it is undisputed that this statute has never been applied against Plaintiff. The receiver in this case was appointed by the Wayne County Circuit Court judge pursuant to a different statute, not the Wayne County Friend of Court. Additionally, Plaintiff's license to practice law has never been suspended under MCL 552.628; MSA 25.164(28). Although procedures were started under this statute, these procedures were not completed and Plaintiff has made no

showing that any further attempt to take his license has been initiated. Moreover, since Plaintiff's ongoing custody case is now under the jurisdiction of the Macomb County Circuit Court, the Wayne County Circuit Court may no longer take any action against Plaintiff.

The case *of Johnson* v *Turner,* 125 F3d 324 (CA 6, 1997) is instructive in this matter. In *Johnson,* the Sixth Circuit Court of Appeals held that two fathers, who filed a § 1983 action against a Tennessee juvenile court alleging that the statute pertaining to contempt and paternity proceedings were unconstitutional, did not have standing to bring the federal lawsuit where the plaintiffs were not involved in any pending paternity or contempt proceeding and where the plaintiffs could not show that they suffered from present, continuing adverse consequences flowing from the alleged unconstitutional statutes. The court stated:

In sum, at the time they filed these federal actions, none of the plaintiffs was incarcerated or involved in a pending paternity, support or contempt proceeding, and any constitutional challenges associated with the state court orders and proceedings are, therefore, moot. Those terminated state court actions cannot provide the requisite live case or controversy to confer upon these plaintiffs standing to challenge the constitutionality of the contempt and paternity procedures or statutes. The plaintiffs might have

avoided this result had they alleged a continuing, present adverse effect as a result of the state juvenile court paternity and support proceedings and judgments. The plaintiffs have not identified any continuing, present adverse consequences flowing from their having been subject to the paternity and contempt orders and the arrest warrants. *Johnson* at 337-338.

Subject to any proceedings for suspension at this time, Plaintiff does not have an injury for which standing may be conferred.

III. Defendant 's Request for Costs

Defendants in this case assert that this lawsuit is frivolous and that costs, including reasonable attorney fees, should be awarded to them. MCL 600.2591; MSA 27A.2591 pertains to the Court's ability to award costs for a frivolous lawsuit and provides as follows:

(1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.

(2) The amount of costs and fees awarded under this section shall include all reasonable costs

actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.

(3) As used in this section:

(a) "Frivolous" means that at least I of the[1] following conditions is met:

(i)The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
(ii)The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
(iii) The party's legal position was devoid of arguable legal merit.

(b) "Prevailing party" means a party who wins on the entire record.

Based on this standard, the Court finds that this lawsuit was frivolous and that all Defendants are entitled to actual costs, including court costs and reasonable attorney fees. This suit is frivolous because the Plaintiffs Complaint is devoid of arguable legal merit and because the Plaintiffs primary purpose in initiating this action was to harass, embarrass, or injure the prevailing parties.

Beginning with the seven named circuit courts, the case law is clear that one circuit court may not take action against another, especially in the nature of the relief sought in this case. This principle is also true for the named friend of courts, which by statute are under direct control of the circuit court. Likewise, the circuit court has no authority to take the requested action against the State Friend of Court Bureau, an entity under the direct control of the Michigan Supreme Court.

Moreover, with respect to Plaintiff's claim that MCL 552.628; MSA 25.164(28) is unconstitutional, Plaintiff brought this, same claim in a case he filed in federal district court. In September, 1999, the Honorable Denise Hood held that the court would not address this issue where Plaintiff has not been subjected to this statute. *Tindall* v *Wayne Court Friend of Court,* unpublished opinion of the United States District Court, Eastern District of Michigan, decided September 30, 1999 (Docket No. 98-CV-73896-DT). This same claim was addressed in this case and this Court made the exact same finding, that the Plaintiff may not raise the issue of the constitutionality of this statute where he has not been subject to it. Therefore, Plaintiff was aware prior to filing this lawsuit that one forum had already determined this claim to be devoid of merit, yet Plaintiff chose to again pursue this claim in another forum in hopes of a favorable outcome. The Court concludes that under these

circumstances, this claim was brought to harass Defendants.

Similarly, Plaintiff's allegation that the procedures pertaining to a friend of court appointing a receiver are unconstitutional are completely devoid of merit where this procedure was never applied in Plaintiff's case, and therefore, he lacked standing to raise this issue.

The Court further concludes that Plaintiff's claims against Defendant Findling and the Findling Law Firm were devoid of legal merit and brought to harass and embarrass these Defendants. First, Plaintiff's claims are devoid of legal merit where the case law is clear that Plaintiff must seek permission to file a claim against a court appointed receiver from the appointing court prior to bringing suit. This is evident by the fact that the receiver in this case has not taken action against a single piece of Plaintiff's property. Thus, there can be no claim that Defendant Findling took improper action under color of his authority. This action is nothing more than an attempt to collaterally attack the appointment of the receiver. Additionally, it is apparent to this Court that Plaintiff attempted to harass or embarrass Defendant Findling with the filing of this lawsuit where Plaintiff identifies this Defendant in the caption of this case as "the garbage man." This name is in no way a legal identification of the Defendant. It is inappropriate to include such name calling in the caption of a

Complaint.

Based on all these findings, the Court concludes that this lawsuit is frivolous and Defendants are entitled to costs.

ORDER

IT IS ORDERED that all of the Defendants' Motions for Summary Disposition are GRANTED for the reason that this Court lacks subject matter jurisdiction and because Plaintiff lacks standing to bring this claim. The Complaint is hereby DISMISSED in its entirety.
IT IS FURTHER ORDERED that Defendants' Motion for Costs is hereby GRANTED and Defendants are entitled to actual costs and reasonable attorney fees, as this Complaint is frivolous.

Dated: May 30, 2000

Hon. Peter D. Houk
Circuit Court Judge
TRUE COPY

Supreme Court, U.S.
FILED
MAR 15 2002
CLERK

No. 01-1168

IN THE

Supreme Court of the United States

MICHAEL E. TINDALL,

Petitioner,

v.

WAYNE COUNTY FRIEND OF THE COURT, WAYNE COUNTY SHERIFF'S DEPARTMENT, and WAYNE COUNTY CIRCUIT COURT, FAMILY DIVISION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT WAYNE COUNTY CIRCUIT COURT, FAMILY DIVISION

JOSEPH C. MARSHALL III
Counsel of Record
ANN-JEANNINE FOELLER
DICKINSON WRIGHT PLLC
Attorneys for Respondent Wayne County Circuit Court, Family Division
500 Woodward Avenue
Suite 4000
Detroit, Michigan 48226
(313) 223-3500

172890

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Should this Court deny certiorari to review whether the Sixth Circuit Court of Appeals properly held that the District Court was required to abstain from reviewing the constitutionality of the practices and procedures applied to the Petitioner by a state court to enforce the state court's own orders when: (1) the rule of law applied by the Sixth Circuit does not conflict with the decisions of any other Circuit Court or of this Court; (2) the Sixth Circuit properly applied the *Younger* abstention doctrine to the Petitioner's claims; (3) the Petitioner's claims are barred by the Eleventh Amendment; and (4) the Petitioner's claims are moot?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Statement of the Case	1
Reasons for Denying the Writ	4
A. The Petition Does Not Raise Any Issues Beyond An Alleged Misapplication Of The Law.	5
B. The Sixth Circuit Properly Applied The *Younger* Abstention Doctrine.	6
C. Plaintiff's Claims Are Barred By The Eleventh Amendment To The United States Constitution.	10
D. Plaintiff's Claims Are Moot.	12
Conclusion	15

TABLE OF CITED AUTHORITIES

Page

Cases:

Abick v. State of Michigan, 803 F.2d 874 (6th Cir. 1986) 10

Ballard v. Wilson, 856 F.2d 1568 (5th Cir. 1988) .. 6

Carras v. Williams, 807 F.2d 1286 (6th Cir. 1986) ... 12

Davila v. State of Texas, 489 F. Supp. 803 (S.D. Tex. 1980) 7

Employees of the Dep't of Pub. Health & Welfare v. Missouri Dep't of Pub. Health & Welfare, 411 U.S. 279 (1973) 10

Estate of Ritter v. University of Michigan, 851 F.2d 846 (6th Cir. 1988). 10

Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459 (1945). 11

Hawaii v. Gordon, 373 U.S. 57 (1963) 11

Juidice v. Vail, 430 U.S. 327 (1977) 5

Kirschner, D.D.S. v. Klemons, D.D.S., 225 F.3d 227 (2d Cir. 2000) 5, 6

Kugler v. Helfant, 421 U.S. 117 (1974). 7

Cited Authorities

	Page
McPherson v. Michigan High School Ath. Ass'n, 119 F.3d 453 (6th Cir. 1997)	12
Moore v. Sims, 442 U.S. 415 (1979)	9
Mumford v. Basinski, 105 F.3d 264 (6th Cir. 1997)	10
Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986)	8
Pennhurst State School and Hosp. v. Halderman, 465 U.S. 89 (1984)	10, 11
Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987)	5
Perez v. Ledesma, 401 U.S. 82 (1971)	7
Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299 (1990)	10
Powell v. McCormack, 395 U.S. 486 (1969)	12
Shaw v. Garrison, 467 F.2d 113 (5th Cir. 1972)	8
Tindall v. Wayne County Friend of the Court, 269 F.2d 534 (6th Cir. 2001)	1, 2
United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980)	12

Cited Authorities

	Page
Weitzel v. Div. of Occup. & Prof. Licensing of the Dep't of Commerce of the State of Utah, 240 F.3d 871 (10th Cir. 2001)	6
Will v. Michigan Dep't of State Police, 491 U.S. 57 (1989)	11
Wilson v. Thompson, 593 F.2d 1375 (5th Cir. 1979)	7
Worldwide Church of God, Inc. v. State of California, 623 F.2d 613 (9th Cir. 1980)	6
Younger v. Harris, 401 U.S. 37 (1971)	*passim*
Constitutional Amendment:	
U.S. Const. amend. XI	*passim*
Rules:	
Sup. Ct. R. 10	4, 5

STATEMENT OF THE CASE

Plaintiff-Petitioner, Michael Tindall ("Plaintiff") is a licensed attorney who has represented himself throughout the proceedings in this case. Plaintiff was divorced in 1991, at which time he was ordered by the Defendant-Respondent Wayne County Circuit Court, Family Division (the "Circuit Court") to pay support for his minor children. Since that time, he has been subjected to at least eight separate enforcement proceedings to collect his delinquent court ordered child support obligations. *Tindall v. Wayne County Friend of the Court*, 269 F.2d 534, 535, 536 (6th Cir. 2001). In short, "[Plaintiff] is a noncustodial parent who has continually and inexplicably failed to comply with court orders requiring him to make support payments for his minor children." *Id.* at 535.

Rather than comply with the Orders to support his children, or follow proper state court procedures for contesting them, Plaintiff instead has engaged in repeated improper collateral attacks on the practices and procedures utilized by the Circuit Court to enforce these Orders.[1]

---

1. For example, prior to filing suit in the District Court, Plaintiff filed Complaints for Superintending Control in the Michigan Court of Appeals and the Michigan Supreme Court, both of which were summarily dismissed. *See Tindall, supra*, at 537. Subsequent to filing his Complaint in the District Court, Plaintiff filed in the Ingham County Circuit Court a Class Action Complaint against the State of Michigan, the Michigan Friend of the Court Bureau, the Wayne County Circuit Court and Friend of the Court and the Circuit Courts and Friends of the Court of six other counties, alleging several claims that were virtually identical to the claims he alleged in the District Court. A copy of this Class Action Complaint is included in Petitioner's Appendix, Vol. II. The Ingham County Circuit Court, which does not have jurisdiction to review the practices and

(Cont'd)

This case is another one of those improper collateral attacks. Plaintiff's Petition for a Writ of Certiorari should be denied because the Sixth Circuit correctly held that the District Court should have abstained from reviewing any of Plaintiff's objections to the practices and procedures followed by the Circuit Court.

The enforcement proceeding that triggered Plaintiff's Complaint in the District Court was instituted when the Defendant-Respondent Wayne County Friend of the Court ("Friend of the Court")[2] served Plaintiff with a Notice of Hearing. This Notice of Hearing informed Plaintiff that the Friend of the Court "would seek an order suspending his license to practice law for his failure to pay court-ordered child support." *Id.* at 537. After receiving this Notice, Plaintiff "filed no motion to quash the notice, failed to appear at the hearing, and did not otherwise raise a challenge to it in state court, but proceeded instead to federal court to file the lawsuit presently before us." *Id.* It is significant to note that during the myriad of child support enforcement proceedings that have been brought against the Plaintiff, he never raised the constitutional challenges to the proceedings that he makes in this case, nor did he take any appeals from those proceedings to challenge the procedures followed by the Circuit Court.

(Cont'd)

procedures of another circuit court, dismissed Plaintiff's Complaint. It also held that Plaintiff's claims were frivolous, and awarded attorney fees and costs to all defendants. A copy of this Opinion and Order is included in Petitioner's Appendix, Vol. III. Plaintiff subsequently filed bankruptcy and avoided paying the attorney fees and costs.

2. The Friend of the Court is an arm of the Circuit Court.

The District Court reviewed the procedures that were allegedly followed by the Circuit Court when issuing Orders to Show Cause and Bench Warrants against non-custodial parents who fail to comply with child support Orders, and who fail to appear at the show cause hearings. After reviewing these procedures, the District Court declared them to be an unconstitutional violation of the right to due process guaranteed by the Fourth Amendment of the United States Constitution. While the District Court noted that the *Younger* abstention doctrine[3] required it to abstain from reviewing the practices and procedures of the Circuit Court, the District Court erroneously concluded that, because it found the practices and procedures to be unconstitutional, the bad faith exception to *Younger* had been met.

On appeal, the Sixth Circuit Court of Appeals vacated the judgment of the District Court, holding that the District Court should have abstained from reviewing Plaintiff's constitutional challenges to the Circuit Court's practices. The Sixth Circuit observed that Plaintiff could have, but did not, challenge the constitutionality of the alleged practices and procedures followed by the Circuit Court. Thus, the Sixth Circuit concluded that Plaintiff had an adequate opportunity in the state court to assert his constitutional challenges to the state court proceedings and that the District Court should have abstained from reviewing the merits of those challenges.

Plaintiff now has petitioned this Court to grant a writ of certiorari. Plaintiff does not claim that the Sixth Circuit's opinion sets forth a rule of law that conflicts with the opinions from any other circuits or that is contrary to any opinions of

---

3. The *Younger* abstention doctrine was established in *Younger v. Harris*, 401 U.S. 37 (1971).

this Court. Plaintiff merely claims that the Sixth Circuit erred in its application of the bad faith exception to the *Younger* abstention doctrine. An alleged misapplication of a properly stated rule of law is rarely a sufficient reason to grant certiorari. *See* Sup. Ct. R. 10. Accordingly, the Petition should be denied.

Additionally, this case does not present one of those rare instances where the Court might grant certiorari to correct a significant error by the lower court. As is fully explained below in the reasons why the writ should be denied, the Sixth Circuit did not commit any error in applying the *Younger* abstention doctrine, much less an error of such magnitude that this Court should exercise its supervisory powers. Moreover, regardless of the correctness of the Sixth Circuit's opinion, Plaintiff's Petition should be denied because Plaintiff's claims are asserted against an arm of the state and are barred by the Eleventh Amendment to the United States Constitution. Finally, Plaintiff's Petition also should be denied because Plaintiff's divorce case has been transferred to the Macomb County Circuit Court, which means that he is no longer subject to the practices and procedures to which he objects and his claims are moot.

REASONS FOR DENYING THE WRIT

There are four reasons why the Court should deny Plaintiff's Petition for Writ of Certiorari: (1) the Petition does to raise any issue other than whether or not the Sixth Circuit committed error when it applied the *Younger* abstention doctrine to Plaintiff's claims; (2) the Sixth Circuit properly applied the *Younger* abstention doctrine to Plaintiff's claims; (3) Plaintiff's claims are barred by the Eleventh Amendment to the United States Constitution; and (4) Plaintiff's claims are moot. The following more fully elaborates on each of these reasons.

A. THE PETITION DOES NOT RAISE ANY ISSUES BEYOND AN ALLEGED MISAPPLICATION OF THE LAW.

Rule 10 of the Rules of the Supreme Court of the United States makes it clear that "[a] petition for a writ of certiorari will be granted only for compelling reasons." Compelling reasons include: conflicts in decisions between the Circuit Courts of Appeal; departures that are so far from the accepted and usual course of judicial proceedings that they call for an exercise of this Court's supervisory powers; and opinions by state supreme courts and federal courts of appeal that decide a federal question that has not been reviewed by this Court or that decide a federal question in a manner that conflicts with decisions from this Court. *Id.* There is no compelling reason presented in this case.

In the case at bar, the Sixth Circuit Court of Appeals applied the well established *Younger* abstention doctrine and held that the District Court was required to abstain from reviewing the procedures that were allegedly applied to a state court litigant who could have, but did not, challenge those procedures in the state court. The Sixth Circuit's decision is consistent with decisions from the other courts of appeal, and follows decisions issued by this Court. *See, e.g., Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14 (1987) (when the "challenges relate to pending state proceedings, proper respect of the ability of state courts to resolve federal questions presented in state-court litigation mandates that the federal court stay its hand); *Juidice v. Vail*, 430 U.S. 327, 337 (1977) ("Here it is abundantly clear that appellees had an opportunity to present their federal claim in the state proceedings. No more is required to invoke *Younger* abstention."); *Kirschner, D.D.S. v. Klemons, D.D.S.*, 225 F.3d

227, 235 (2d Cir. 2000) ("*Younger* abstention is required unless " 'it plainly appears' " that the federal claim cannot be determined in the state proceeding"); *Ballard v. Wilson*, 856 F.2d 1568, 1571 (5th Cir. 1988) ("intervention is only appropriate when a party has no *opportunity* to present his federal claim in a state proceeding" (emphasis by the court)); *Worldwide Church of God, Inc. v. State of California*, 623 F.2d 613, 615-16 (9th Cir. 1980) (*Younger* abstention requires a party to "exhaust its state appellate remedies . . . before seeking relief in a federal court"); *Weitzel v. Div. of Occup. & Prof. Licensing of the Dep't of Commerce of the State of Utah*, 240 F.3d 871, 875 (10th Cir. 2001) (the district court must abstain "when a state forum provides an adequate avenue for relief"). Thus, in this case there is no conflict between the Circuits, no departure from accepted practices, and no decision on federal questions that this Court has not reviewed or that conflict with decisions from this Court. Accordingly, Plaintiff's Petition should be denied.

Moreover, even if this Court were inclined to review the merits of this case, the following shows that the Sixth Circuit properly applied the *Younger* abstention doctrine, and did not commit any error that this Court could correct.

B. THE SIXTH CIRCUIT PROPERLY APPLIED THE *YOUNGER* ABSTENTION DOCTRINE.

The Sixth Circuit reversed the District Court's holding that two of Plaintiff's claims fell within the bad faith exception to the abstention doctrine. Even though Plaintiff cannot dispute that he never used, much less exhausted, his state court remedies, Plaintiff erroneously argues that the Sixth Circuit should have found the bad faith exception to *Younger* abstention applicable. The types of actions that

satisfy this exception were described in *Davila v. State of Texas*, 489 F. Supp. 803, 808-09 (S.D. Tex. 1980):

> 5. The second broad exception to the *Younger* rule is the bad faith or harassment exception. Precedent suggests that this exception can take several forms. . . . First, the Supreme Court in *Perez v. Ledesma*, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971) described the exception to involve "proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction." *Id.* at 85, 91 S.Ct. at 677. *See also Kugler v. Helfant*, 421 U.S. 117, 126 at fn. 6, 95 S.Ct. 1524, 1531 at fn. 6, 44 L.Ed.2d 15 (1974). . . . The fact that [an individual] would be required to defend himself in a single state court prosecution is not sufficient to create an exception to the *Younger* rule. 401 U.S. at 46, 91 S.Ct. at 751.
>
> 6. The second variation under the bad faith exception involves situations where a state prosecution is directly designed to retaliate against or deter one from exercising a protected constitutional right. *Wilson v. Thompson*, 593 F.2d 1375 (5th Cir. 1979). Plaintiff does not claim that this situation exists in the present case and the Court can find no evidence of it.
>
> 7. A third variety of bad faith involves unreasonably severe and harsh state prosecutorial conduct when balanced against a relatively minor offense, together with possible overtones of racial or ethnic prejudice. . . .

> 8. The next variation under the bad faith exception appears to be one where the overall totality of the circumstances are such as to warrant a finding of bad faith. *Shaw v. Garrison*, 467 F.2d 113 (5th Cir. 1972). There, the district court had specifically found that he was not dealing with a single good faith prosecution but instead characterized the facts as being "unique and bizarre." . . .

This review of the types of actions that fall within the bad faith exception shows that the issue of bad faith relates to the motivations for the prosecutions. The issue of bad faith does not relate to challenges to the procedures that are applied to prosecutions brought it good faith. The bad faith exception to the abstention doctrine is narrowly construed, and is not to be applied "except in the very unusual situation that an injunction is necessary to prevent great and immediate irreparable injury." *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 626 (1986).

Here, even if there was merit to Plaintiff's allegations that the Circuit Court permits the Friend of the Court to issue orders to show cause and bench warrants without judicial supervision when child support payers fail to pay their support or appear at hearings, which the Circuit Court vehemently denies, such actions would not meet the definition of bad faith. This is because there is no allegation, nor was there any finding by the District Court, that the child support enforcement proceedings were brought in bad faith to harass the Plaintiff.

In this case, the District Court reviewed the merits of Plaintiff's constitutional challenges to the Circuit Court's

practices and procedures and concluded that if the bench warrants and orders to show cause were issued without judicial supervision, then Plaintiff's rights to due process guaranteed by the Fourteenth Amendment were violated. After reviewing the merits of Plaintiff's constitutional challenges, the District Court erroneously concluded that if Plaintiff's due process rights were being violated, then he was being prosecuted in bad faith, regardless of the motivation or intent of the prosecution and regardless of whether the Plaintiff had an opportunity to challenge the allegedly unconstitutional procedures in the state court action. This is not the standard for bad faith, because this Court has made it clear that the bad faith exception to abstention is not available when the alleged constitutional violations that comprise the alleged bad faith can be addressed adequately in the state appellate courts. *Moore v. Sims*, 442 U.S. 415, 432 (1979).

Based on the foregoing, the Sixth Circuit did not err when it concluded that the bad faith exception to *Younger* abstention did not apply, or when it held that the District Court should have abstained from ruling on the merits of Plaintiff's claims. Moreover, even if the Sixth Circuit had erred, Plaintiff's Petition for a Writ of Certiorari must still be denied because there is no relief that can be afforded to Plaintiff even if the Sixth Circuit is reversed. This is because the Eleventh Amendment bars the relief Plaintiff seeks and because Plaintiff's claims have become moot.

C. PLAINTIFF'S CLAIMS ARE BARRED BY THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The district court did not have subject matter jurisdiction over Plaintiff's claims because the Eleventh Amendment to the United States Constitution prohibits a federal court from exercising jurisdiction over a claim made by a citizen against a state. A state court, such as the Circuit Court here, is an arm of the state and is entitled to Eleventh Amendment protection. *Abick v. State of Michigan*, 803 F.2d 874 (1986); *Mumford v. Basinski*, 105 F.3d 264 (1997), *cert. denied*, 522 U.S. 914 (1997).[4] This Court "has drawn upon principles of sovereign immunity to construe the Amendment to 'establish that "an unconsenting State is immune from suit brought in federal courts by her own citizens as well as by citizens of another state." ' " *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990) (quoting *Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (quoting *Employees of the Dep't of Public Health & Welfare v. Missouri Dep't of Public Health & Welfare*, 411 U.S. 279, 280 (1973))). This Court has also made it "clear, of course, that in the absence of consent, a suit in which the State or one if its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984).

---

4. The Eleventh Amendment may be raised as a defense at any time, and may be raised for the first time on appeal. *Estate of Ritter v. University of Michigan*, 851 F.2d 846 (6th Cir. 1988). The Eleventh Amendment was briefed and argued in the Sixth Circuit. However, because the Sixth Circuit decided the case on the basis of abstention, it did not reach the issue of the Eleventh Amendment.

The State of Michigan has never consented to permit a disgruntled state court domestic relations litigant to sue it in federal court.[5] Furthermore, the naming of Judges Kelly and Sapala in the caption does not preclude the Eleventh Amendment prohibition against suit. As Plaintiff himself admitted during the lower court proceedings, Judges Kelly and Sapala were named solely as nominee representatives of the Circuit Court and no relief is sought from either of them individually. "The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) (per curiam). *See also Will v. Michigan Dep't of State Police*, 491 U.S. 57, 71 (1989); *Pennhurst* at 101-102 (quoting *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 464 (1945)).

Here, because the relief Plaintiff seeks is the enjoining of the Circuit Court from engaging in specific action, the relief sought is against the State, not against any individual state official in his or her individual capacity, and Plaintiff's claims are barred. Further, even if not barred, Plaintiff's claims now are moot.

---

5. The fact that plaintiff filed his suit as a 42 U.S.C. § 1983 action does not provide relief from Eleventh Amendment immunity. The Supreme Court spoke directly to this issue in *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989), stating: "Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties." The *Will* court concluded that the "Eleventh Amendment bars such suits unless the State has waived its immunity." *Id.*

D. PLAINTIFF'S CLAIMS ARE MOOT.

Plaintiff admits in his Petition that at his request his divorce action has been transferred out of the Wayne County Circuit Court and is now pending in the Macomb County Circuit Court. The transfer was conducted through Orders duly made and entered on the docket of the Circuit Court. Plaintiff included copies of those Orders in Appendix, Vol. I, Exhibits E and F, pp. 78-85. The Orders show that, at Plaintiff's request, his case was being transferred to another county. Thus, the transfer was not made pursuant to any "secret" orders as stated in Plaintiff's Petition, nor was it something that was orchestrated by the Circuit Court to moot the Plaintiff's claims. Nevertheless, as a result of the transfer, Plaintiff is no longer subject to the practices and procedures of the Circuit Court and his claims are moot.

A case becomes moot when the relief sought, if granted, would not make a difference in the legal interest of the parties. *McPherson v. Michigan High School Ath. Ass'n*, 119 F.3d 453, 458 (6th Cir. 1997). "[M]ootness has two aspects: 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.' " *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). Stated another way, "[m]ootness results when events occur during the pendency of a litigation which render the court unable to grant the requested relief." *Carras v. Williams*, 807 F.2d 1286, 1289 (6th Cir. 1986). Here the transfer to Macomb County rendered the Wayne County Circuit Court incapable of taking any action with respect to Plaintiff's divorce action. Hence, after the transfer the Circuit Court could not render any relief on Plaintiff's claims and Plaintiff's claims became moot. Accordingly, the Circuit Court filed

suggestions of mootness in the District Court and the Sixth Circuit Court of Appeals.

Plaintiff's Petition suggests that Plaintiff's claims are not moot because there allegedly are "collateral consequences" remaining from the time before the Wayne County Circuit Court transferred his case. The "collateral consequences" include: the appointment of a receiver to try to collect Plaintiff's delinquent child support obligations; an allegedly unauthorized adjustment to Plaintiff's child support account; and an Order to pay medical expenses and sanctions. The Petition goes so far as to misrepresent that the Order transferring his divorce case to Macomb County "expressly preserved, by its terms, the collateral consequences of receivership, sanctions, and, illegal account adjustments flowing directly from Respondent's [allegedly] unconstitutional conduct." (Petition pp. 20-21). This representation is patently false.

Prior to entry of the Order transferring Plaintiff's case to Macomb County, Plaintiff had moved the Court to dissolve the receivership, to set aside an order to pay medical expenses and sanctions, and to reverse unauthorized adjustments to his child support account. In the Order transferring Plaintiff's case to Macomb County, the Wayne County Circuit Court ordered that this motion was "adjourned to be heard following reassignment of this case" to Macomb County. Thus, the Circuit Court did not "expressly preserve" these "collateral consequences"; it merely deferred them to the Macomb County Circuit Court after Plaintiff moved to have his case transferred out of Wayne County. Plaintiff is free to have all of these alleged "collateral consequences" reviewed in the state court simply by moving the Macomb County Circuit Court to review them. If he is not satisfied with the Macomb

County Circuit Court's disposition of them, he can appeal to the Michigan Court of Appeals and to the Michigan Supreme Court.

Shortly before the Sixth Circuit issued its opinion vacating the District Court's judgment on abstention grounds, the District Court issued an opinion in which it held that Plaintiff's claims were moot, and requested remand from the Sixth Circuit to vacate the judgment and dismiss the Plaintiff's Complaint for that reason. Plaintiff included a copy of this opinion in Appendix, Vol. I, Exhibit D, pp. 54-77. Thus, even if this Court would grant the Petition, reverse the Sixth Circuit, and find that the Eleventh Amendment did not apply, mootness still would require the dismissal of Plaintiff's claims.

CONCLUSION

Plaintiff's Petition for Writ of Certiorari should be denied because it presents no more than an unfounded claim that the Sixth Circuit erred in its application of the *Younger* abstention doctrine. Further, the Petition also should be denied because even if this Court were to grant certiorari and were to reverse the Sixth Circuit, Plaintiff still could not receive the relief he seeks because his claims are barred by the Eleventh Amendment to the United States Constitution and because his claims are moot. For all of the foregoing reasons, Defendant-Respondent Wayne County Circuit Court, Family Division, respectfully requests that this Court deny Plaintiff's Petition for Writ of Certiorari.

Respectfully submitted,

JOSEPH C. MARSHALL III
Counsel of Record
ANN-JEANNINE FOELLER
DICKINSON WRIGHT PLLC
Attorneys for Respondent
Wayne County Circuit Court,
Family Division
500 Woodward Avenue
Suite 4000
Detroit, Michigan 48226
(313) 223-3500

Supreme Court, U.S.
FILED
MAR 15 2002
CLERK

No. 01-1168

IN THE

Supreme Court of the United States

MICHAEL E. TINDALL,

Petitioner,

v.

WAYNE COUNTY FRIEND OF THE COURT,
WAYNE COUNTY SHERIFF'S DEPARTMENT,
and WAYNE COUNTY CIRCUIT COURT,
FAMILY DIVISION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT WAYNE COUNTY FRIEND OF THE COURT

MARGERY MOSELLE MANN
Counsel of Record
JANET LEANNAIS
WAYNE COUNTY FRIEND OF THE COURT
LITIGATION SECTION
Attorneys for Respondent
Wayne County Friend of the Court
P.O. Box 31-0920
Detroit, MI 48231
(313) 224-6992

172889

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

The Wayne County Friend of the Court, which performs its duties under the chief judge pursuant to Michigan Compiled Laws Section 552.503(5), concurs with the Brief In Opposition submitted by the Wayne County Circuit Court, Family Division by Kirsten Frank Kelly and Michael F. Sapala.

For all of the reasons presented therein, Respondent Wayne County Friend of the Court respectfully requests that this Court deny Plaintiff's Petition for Writ of Certiorari.

Respectfully submitted,

MARGERY MOSELLE MANN
Counsel of Record
JANET LEANNAIS
WAYNE COUNTY FRIEND OF THE COURT
LITIGATION SECTION
Attorneys for Respondent
Wayne County Friend of the Court
P.O. Box 31-0920
Detroit, MI 48231
(313) 224-6992

Supreme Court, U.S.
FILED
MAR 20 2002
CLERK

(6)

No. 01-1168

In The
Supreme Court of the United States

MICHAEL E. TINDALL
Plaintiff-Petitioner
v.
WAYNE COUNTY FRIEND OF THE COURT, By JOSEPH A. SCHEWE, Director of Legal Services; ALAN E. SKROK, Staff Attorney, Assistant Friend Of Court; WAYNE COUNTY SHERIFF'S DEPARTMENT, By: ROBERT FICANO, Sheriff; WAYNE COUNTY CIRCUIT COURT, FAMILY DIVISION, By: KIRSTEN FRANK KELLY, Presiding Judge; MICHAEL F.SAPALA, Chief Judge
Defendants-Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

REPLY BRIEF IN SUPPORT OF WRIT OF CERTIORARI

Michael E. Tindall
Counsel of Record
TINDALL & CO. P.C.
49 Macomb Pl., Ste 29
Mt. Clemens MI
48043 (313) 640-4450

12pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

RULE 15.6 STATEMENT 1

I. PETITIONER'S CLAIMS ARE NOT BARRED BY THE ELEVENTH AMENDMENT.....1

A. MICHIGAN DOES NOT PROVIDE A FAIR AND IMPARTIAL TRIBUNAL FOR DOMESTIC RELATIONS LITIGANTS.....1

B. IN RE YOUNG DOCTRINE 3

1. MICHIGAN LAW 3
2. FEDERAL LAW 4

CONCLUSION.....7

TABLE OF AUTHORITIES

Page(s)

CASES

Federal:

Abick v. State of Mich.,
803 F.2d 874 (6th Cir1986) 5

Alden et al v. Maine., 527 US 706 (1999).....6, 7

Ex parte Young,
209 US 123(1908).....3,6

Henry v. Mississippi, 375 US 449 (1958) 2

Idaho v. Coer'd Aleno Tribe of Idaho,
521 US 261 (1997).....7

Johnson v. Mississippi,
403 US 212 (1971) 7

Milliken v, Bradley, 433 US 267 (1977) 5

Mumford v. Basinski, 105 F.3d 264 (6th Cir1997).5

NAACP v. Alabama, 357 US 449 (1958) 2

Reich v. Collins, 513 US 106 (1994) 7

Staub v. City of Baxley, 379 US 443 (1964) 2

Wills v. Mich. Dept. of State Police,
491 US 58 (1989).....4,5

State:

Campbell v. Evans, 358 Mich 128 (1959) 4

Dick v. Dick, 210 Mich App 576 (1995) 4

Hoke v. Hoke, 162 Mich App 201 (1987) 4

In re AMB, 2001 Mich App LEXIS 217 4

Thompson v. Auditor General,
261 Mich 624 (1933).....3,4,5

RULE 15.6 STATEMENT

Pursuant to subsection 6 of Rule 15.6, Petitioner hereby submits it Reply Brief addressing Respondents' argument C, PP 10-12, regarding the Eleventh Amendment.

I. PETITIONER'S CLAIMS ARE NOT BARRED BY THE ELEVENTH AMENDMENT

A. MICHIGAN DOES NOT PROVIDE A FAIR AND IMPARTIAL TRIBUNAL FOR DOMESTIC RELATIONS LITIGANTS.

Respondents argue that Michigan does not "consent" to suit by domestic relations litigants challenging the illegal conduct of Michigan courts. Res. Brf. P 11. As demonstrated by this case, and, the May 30, 2000 decision of the Ingham County Circuit Court, App. H,Vol. III, Michigan courts actively and punitively discourage such challenges by manipulating their state court record; by manufacturing fallacious "standing" and "mootness" defenses; by premature dismissals;

and, by the punitive, "in terrorem" application of state procedural rules and litigation "pleading sanctions"; all designed to insulate state court actors from federal constitutional challenges to their illegal conduct. This Court has repeatedly held such state court "tactics" will not succeed as a means to evade federal constitutional review. 1

Respondents' counsel's own representations to the Ingham County Circuit Court, in the state class action, are illuminating :

> **"Plaintiff's request for relief, if granted, could have resulted in the restructuring of the family divisions of every circuit court in the state of Michigan. It could have resulted in an order of restitution amounting to millions of dollars to be paid by the State of Michigan. Thus, the potential relief requested in this case was significant. "**

---

1 *NAACP v. Alabama, 357 US 449 (1958) (mandamus vs. regular appeal insufficient state procedural ground to evade federal review); Staub v. City of Baxley, 355 US 313 (1958) (standing argument insufficient to evade federal review); Henry v. Mississippi, 379 US 443 (1964) (state ground of alleged waiver is, itself, a federal question subject to review)*

Michigan courts (while technically competent to do so) actively discourage and penalize the assertion of federal constitutional challenges to their own illegal actions and procedures.

B. IN RE YOUNG DOCTRINE.

Respondents argument that an action against state officers, in their representative capacity, is an action against the State of Michigan ignores both applicable and controlling Michigan, and, federal law.

1. MICHIGAN LAW:

Expressly relying on *Ex parte Young, 209 US 123 (1907)*, the Michigan Supreme Court ruled, in *Thompson v. Auditor General, 261 Mich 624 (1933)*, that an action against an officer of the State of Michigan, in his official capacity, **is not** an action against the State of Michigan under the Eleventh Amendment. *261 Mich 624 at 628.* Thompson addressed many of the identical due

process issues presented by this case. *Id at 646-651.*

Under the Michigan Supreme Court's own interpretation of both the Michigan and the U.S. Constitutions, Respondents' acts complained of in this case are clearly illegal and unconstitutional. *Campbell v. Evans, 358 Mich 128 (1959) at 131; Dick v. Dick, 210 Mich App 576 (1995) at 583; Hoke v. Hoke, 162 Mich App 201 (1987) at 207.* Nevertheless, Respondents continue to delegate judicial power to non judicial personnel, and, referees in its family/domestic relations courts.2

2. FEDERAL LAW:

Citing *Wills v. Michigan Dept. of State Police, 491 US 58 (1989),* Respondents argue that 42 USC 1983 does not provide relief from Eleventh

---

2 *See, ex., In re AMB, ___Mich App ___ (November 6, 2001), 2001 Mich App LEXIS 217(critically ill infant killed by termination of life support under WCCC* ***referee*** *issued,* ***"stamped"*** *order in "unredeemably flawed" proceedings involving no judicial review; no adequate legal representation; and, no notice or due process to parents).*

Amendment immunity in actions against a state for alleged deprivation of civil rights. Yet, this Court expressly ruled in *Wills*, identically to the Michigan Supreme Court's ruling in *Thompson*, that actions directed against state officers in their official capacity for violation of Sec. 1983 are not actions against the state, and, are not barred. *Wills, at 71, n10.*

This Court has made clear that it is the "prospective character" of the relief sought, rather than the nature of the relief (injunction), or, the nominal status of the state official defendants, that determines the validity of the action under the 11th Amendment. *Milliken v. Bradley, 433 US 267 (1977) at 288-289.* 3

---

3 The court of appeals decisions cited by Respondents are clearly distinguishable on precisely this ground. *Mumford v. Basinski, 105 F.3d 264 (1997)*, expressly found a damage claim for back pay and back benefits to be retrospective rather than "prospective", therefore *Young* was inapplicable. In *Abick v. State of Michigan, 803 F.2d 874 (1986)*, no specific officer's conduct was challenged, and, no constitutional taking or other

This Court has comprehensively reviewed its various decisions under the Eleventh Amendment, and, has expressly refused to narrow the exception created by *Ex parte Young*. *Idaho v. Coeur d' Alene Tribe of Idaho, 521 US 261 (1997); Alden et al v. Maine, 527 U.S. 706 (1999).*

In *Idaho* , this Court addressed the *Young* doctrine in light of the availability of both "alternate state court remedies", and, the "prospective relief" doctrine approved in *Milliken*. It found *Young* doctrine applicable even where there is a prompt and effective remedy available in a state forum. *Idaho, at 292-293.* This Court emphasized the importance and the necessity of a federal remedy to vindicate federal rights; *Id at 293-294, and, 296,* and expressly recognized the need for the *Young* doctrine to combat punitive state conduct of the type Respondents have used

---

violation for which to grant "prospective" relief occurred. Therefore, *Young* did not apply.

here to evade federal review of their own violations of federal constitutional rights. *Id at 273-274.*

Most recently, in 1999, this Court, in *Alden,* comprehensively reviewed the entire breadth and scope of Eleventh Amendment jurisprudence finding that state sovereign immunity from suit derives not from the Eleventh Amendment at all, but from the structure of the Constitution itself. Despite deference to state sovereignty and immunity from suit, this Court ruled individual constitutional rights, grounded in due process, freedom from unreasonable searches and seizures of property, and, state guaranteed remedies, take priority over the state's interest in immunity from suit. *Alden at 733, 740, 748, and, 756* (citing *Reich v. Collins, 513 US 106(1994)*).

CONCLUSION

Respondents' contention that Petitioner's action is barred by the Eleventh Amendment; and, therefore, the District Court lacked subject matter

jurisdiction, in the first instance, flies in the face of established Michigan and federal sovereign immunity doctrine.

Respectfully submitted,

Michael E. Tindall
TINDALL & CO. P.C.
49 Macomb PL., Ste 29
Mt. Clemens, MI 48043
(313) 640-4450
Counsel of Record

Dated: March 19, 2002